Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

CROPLIFE AMERICA, *ET AL.*,

Petitioners,

v.

WASHINGTON TOXICS COALITION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case brought to determine whether a federal agency implementing its statutory mandate has violated procedural requirements of the Endangered Species Act ("ESA"), is the lawfulness of the agency's action judged pursuant to Administrative Procedure Act ("APA") standards and methods or is the court free to make a *de novo* determination about how the agency should have proceeded?

2. Whether (even assuming that APA standards do not apply) in reviewing the federal agency's actions here, the courts below erred in concluding that:

a. A federal agency "violates the ESA" by not engaging in "formal or informal consultation" with the Secretary of Commerce (16 U.S.C. § 1536(a)(2)), where implementing regulations require consultation only if the agency concludes that its action "may affect listed species or critical habitat" (50 C.F.R. § 402.14(a)); and

b. Where a comprehensive statute (the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")) prescribes ESA-specific limitations (7 U.S.C. §§ 136(*l*), 136d(c)) on when the use of an approved pesticide shall be suspended in light of ESA concerns, a court can enjoin pesticide use based on an ESA "violation" without regard to whether the FIFRA standards have been met?

PARTIES TO THE PROCEEDINGS

Petitioners – who were jointly represented as intervenor-defendants before the district court and as appellants in the Ninth Circuit – are CropLife America (formerly American Crop Protection Association), Agricultural Cooperative Council of Oregon, Agricultural Retailers Association, American Forest Resource Council, California Agricultural Aircraft Association, Far West Agribusiness Association, Fruit Growers League of Jackson County, Hood River Grower-Shipper Association, Hop Growers of Washington, Idaho Mint Growers Association, Malheur County Onion Growers Association, National Agricultural Aviation Association, National Potato Council, Orchard View Farms, Oregon Agricultural Chemicals & Fertilizers Association, Oregon Alfalfa Seed Growers Association, Oregon Cattlemen's Association, Oregon Cranberry Network (formerly Oregon Cranberry Farmers' Alliance), Oregon Dairy Farmers Association, Oregon Forest Industries Council, Oregon Farm Bureau Federation, Oregon Hop Growers Association, Oregon Horticultural Society, Oregon Seed Council, Oregonians for Food and Shelter, USA Dry Pea and Lentil Council, Wasco County Fruit & Produce League, Washington Association of Wheat Growers, Washington Mint Growers Association, Washington State Horticultural Association, Washington Friends of Farms and Forests, Western Plant Health Association (formerly California Plant Health Association), Western Washington Agricultural Association, and Western Washington Golf Course Superintendents Association.

Respondents Washington Toxics Coalition, Northwest Coalition for Alternatives to Pesticides, Pacific Coast Federation of Fishermen's Associations, Inc., and Institute

for Fisheries Resources were plaintiffs before the district court and appellees in the Ninth Circuit.

The United States Environmental Protection Agency ("EPA") and the Administrator, EPA (then Christine Todd Whitman and now Stephen L. Johnson) were the lead defendants before the district court and appellants in the Ninth Circuit. The name of current EPA Administrator Johnson is substituted pursuant to Rule 35.

In addition to petitioners, the Washington State Farm Bureau and Washington State Potato Commission were intervenor-defendants in the district court and were separately represented as appellants in the Ninth Circuit.

RULE 29.6 STATEMENT

None of the petitioners has a parent company, and no publicly held company owns a 10% equity interest or more in any petitioner.

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WASHINGTON TOXICS COALITION, *ET AL.*,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners CropLife America, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 413 F.3d 1024. The orders of the United States District Court for the Western District of Washington dated January 22, 2004 (App., *infra*, 20a-87a), August 8, 2003 (App., *infra*, 88a-117a), July 16, 2003 (App., *infra*, 118a-123a), and July 2, 2002 (App., *infra*, 124a-150a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Administrative Procedure Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Endangered Species Act and implementing regulations are set forth at App. F, *infra*, 151a-167a.

STATEMENT OF THE CASE

This case concerns the scope of judicial review and relief for EPA's alleged procedural violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*, in the process of registering 54 pesticide active ingredients over the course of decades under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136, *et seq.* Heretofore, the courts of appeals had consistently held that agency compliance with the ESA must be judged pursuant to the (deferential) standards and methods prescribed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.* The Ninth Circuit has now ruled to the contrary, concluding that because the citizen suit provision of the ESA "independently authorizes a private right of action, the APA does not govern plaintiffs' claims." App. 16a. The result is that the Ninth Circuit (affirming the district court) has held that it can judge the EPA's compliance with the ESA *de novo*, without affording deference to the agency's expertise or interpretation of the various statutes the agency must reconcile in performing its statutory duties.

On the merits, the district court held, and the Ninth Circuit affirmed, that EPA committed "substantial procedural violation[s]" of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to consult with the National Marine Fisheries Service ("NMFS") concerning the alleged effects of 54 pesticide active ingredients on certain salmon in the

Pacific Northwest that NMFS had listed as endangered or threatened species under the ESA. App. 89a; *see id.* at 6a-7a. In so holding under a standard of *de novo* review, the district court and the Ninth Circuit paid little heed to regulations providing that consultation is not required unless and until EPA concludes that a given pesticide registration "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). These "violations" then served as the basis for injunctive relief, including suspension of EPA-authorized pesticide uses pending completion of "may affect" determinations and any needed ESA consultations, without regard to the specific substantive and procedural standards for the suspension of pesticide registrations in light of the ESA as provided by FIFRA itself. *See* 7 U.S.C. §§ 136(*l*), 136d(c).

A. Statutory and Regulatory Background.

APA. The APA governs judicial review of any federal agency action. By its terms, the APA is preemptive of any other statute governing the review of agency action unless there is an express statutory statement to the contrary. The APA explicitly provides that a "[s]ubsequent statute may not be held to supersede" the provisions of the APA "except to the extent that it does so expressly." 5 U.S.C. § 559. Among other things, APA provisions for review of agency action reflect deference to agency expertise and responsibility. The APA authorizes "the reviewing court" to "hold unlawful and set aside agency action, found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706.

ESA. The ESA, 16 U.S.C. §§ 1531-44, provides protections to species listed under § 1533 as endangered or threatened. NMFS and the U.S. Fish and Wildlife Service (collectively, "Services") have adopted interpretative rules

on their ESA "consultation" function at 50 C.F.R. Part 402.

Under ESA § 7(a)(2):

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any...[listed] species or result in the destruction or adverse modification of [designated critical] habitat of such species.

16 U.S.C. § 1536(a)(2). The federal agency proposing the action (here, EPA) is commonly called the "action agency." As developed further below, to avoid tying up scarce resources in evaluating the ESA effects of the thousands of actions/inactions/continuing actions that federal agencies take each day, the Part 402 rules create a triage system. The rules provide three levels of possible § 7(a)(2) review and give the action agency considerable discretion in determining whether and when to consult with the Service. *See* 51 Fed. Reg. 19926, 19950 (June 3, 1986); pages 23-24 *infra*.

ESA § 7(d) provides the legislative judgment on appropriate constraints during ESA consultation. It states that, once consultation is initiated,

> the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d).

The final relevant ESA provision is § 11(g), under which the plaintiffs filed this suit. It affords access to federal courts "to enjoin any person, including the United States and any other governmental instrumentality or agency… alleged to be in violation of the" ESA or an ESA regulation. 16 U.S.C. § 1540(g)(1)(A). It specifies "jurisdiction...to enforce" a specific ESA provision, without identifying a standard and scope of review. *Id.* § 1540(g)(1).

FIFRA. FIFRA is a "comprehensive regulatory statute" aimed at controlling the use, sale, and labeling of pesticides. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1794 (2005). Under FIFRA, a pesticide active ingredient must be registered with EPA through a rigorous process, including extensive data submission, before it may be distributed. 7 U.S.C. § 136a(a). Registration of the ingredient requires EPA to determine that "when used in accordance with widespread and commonly recognized practice [the ingredient] will not generally cause unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(D). This standard takes into account effects on wildlife (including species listed as endangered or threatened under the ESA).

FIFRA also provides for certain ESA-specific relief. FIFRA § 6 allows EPA to compel interim "suspension" of a "registration of the pesticide immediately" or a "change in classification" where "necessary to prevent an imminent hazard during" the longer "time required for cancellation" proceedings. *Id.* § 136d(c)(1)-(2). FIFRA defines an "imminent hazard" to mean that "continued use of the pesticide during the time required for a cancellation proceeding...will involve unreasonable hazard to the survival of a species declared endangered or threatened...pursuant to the" ESA. *Id.* § 136(*l*). FIFRA contains further procedural

and substantive requirements for canceling or suspending a pesticide registration. *Id.* § 136d(a)-(d).

Congress also addressed the relationship between FIFRA and the ESA in § 1010(b) of the 1988 ESA Amendments. There, Congress directed that ESA compliance for EPA's FIFRA program be designed "to minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators." Pub. L. No. 100-478, § 1010(b), 102 Stat. 2313-14 (1988), 7 U.S.C. § 136a note.[1]

B. Proceedings Below.

Plaintiffs brought this action under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). They sought declaratory and injunctive relief against EPA for allegedly violating the ESA by failing to consult with NMFS under

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[1] The quoted text of § 1010 and its history express a clear legislative intent to protect existing food and fiber production uses of pesticides. The Conference Report elaborated:

> Agriculture is a major part of the U.S. economy and provides nutritional sustenance for our population and exports abroad.... The Conferees, therefore, anticipate that...[the federal agencies shall] implement the Endangered Species Act in a way that protects endangered and threatened species while minimizing, where possible, impacts on production of agricultural foods and fiber commodities.

H.R. Conf. Rep. No. 100-928, at 24-25, *reprinted in* 1988 U.S.C.C.A.N. 2738, 2741-42. *See also* 134 Cong. Rec. S12559 (Sept. 15, 1988) (Sen. Burdick's summary that the conference report "recognizes that protection of endangered species is important, but also that agriculture is a major part of our economy and provides sustenance for our population"); *see also id.* at S9761 (July 25, 1988) (remarks of Sen. Mitchell); *id.* at S9756 (July 25, 1988) (remarks of Sen. Byrd).

ESA § 7(a)(2) on the alleged effects of FIFRA pesticide registrations on certain salmon listed as threatened or endangered species under the ESA. CropLife America and 36 other groups representing pesticide manufacturers, formulators, distributors, sellers, and applicators intervened as defendants. EPA and intervenors raised jurisdictional and statutory defenses to the allegation that the absence of consultations violated the ESA. On July 2, 2002, the district court granted summary judgment, concluding that EPA violated ESA § 7(a)(2) by failing to engage in consultation with respect to 54 pesticide active ingredients. The district court ruled, *inter alia*, that because this was an ESA citizen suit, "the APA, including its peculiar doctrines, does not govern plaintiffs' claims." App. 129a. The court ordered EPA to make "effects determinations" under 50 C.F.R. § 402.14(a) and consult, where appropriate, under a time schedule. App. 145a-146a. That time schedule remedy cured the ESA process violation.

In orders issued July 16, 2003, August 8, 2003, and January 22, 2004, the district court granted plaintiffs' request for *further* injunctive relief. App. 20a-87a, 88a-117a, 118a-123a. Finding EPA in "substantial procedural violation" of the ESA for its failure to consult with NMFS, the court enjoined, with few exceptions, EPA's authorization of all uses of hundreds of pesticide products containing any of the 54 active ingredients in buffer zones (20 yards for ground applications and 100 yards for aerial applications) adjacent to all "Salmon Supporting Waters" in Washington, Oregon, and California. App. 24a-31a, 89a. In addition, for pesticides containing seven active ingredients used in urban areas, the court ordered EPA to develop a mandatory point-of-sale notification of a "Salmon Hazard" and required the intervenors to distribute the notification "in quantity...to

sales outlets where lawn and garden products are sold in the Urban Areas subject to this Order." App. 32a-33a.

EPA and the intervenors appealed. A Ninth Circuit panel "affirm[ed] the district court's orders in their entirety." App. 7a. The court of appeals identified three sets of issues: (1) the applicability of the ESA § 7(a)(2) consultation provision to pesticide registrations under FIFRA; (2) the applicability of the judicial review provisions of the APA; and (3) the scope of injunctive relief. App. 11a-19a.

On the first point, EPA had framed the issue as "[w]hether the district court's failure to accommodate FIFRA's unique requirements in enjoining EPA's authorization of use of certain pesticides constituted reversible error given that these requirements...circumscribe EPA's discretion and thus define EPA's legal duties under the ESA." EPA Brf. at 1. The panel recharacterized EPA's argument and found that recharacterized argument unpersuasive. App. 11a. The panel found that FIFRA does not limit "an injunction to enforce the ESA." App. 14a. Despite noting that the ESA and FIFRA have "complementary" purposes, App. 13a, the panel afforded primacy to the ESA. It held that the "scheme of the two statutes suggests the exact opposite" of a regime in which FIFRA "trumps" the ESA. App. 15a. Thus, it affirmed the district court's conclusion that EPA's absence of consultation constituted a violation of ESA § 7(a)(2).

Concerning the applicability of the APA, Petitioners had argued that, even in an ESA citizen suit, APA standards, including review under the "arbitrary and capricious" standard, necessarily apply to suits against federal agencies. CropLife Brf. at 14-23. In response, the Ninth Circuit panel focused on the source of plaintiffs' subject-matter jurisdiction. The panel held that "suits to compel agencies to

comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA." App. 16a. The panel held that because the ESA's citizen suit provision "independently authorizes a private right of action, the APA does not govern the plaintiffs' claims." *Id.*

Lastly, concerning the scope of injunctive relief, the panel explained that the purpose of the consultation process "is to prevent later substantive violations of the ESA." App. 16a. The panel reasoned that the remedy for a "substantial procedural violation of the ESA...must...be an injunction of the project pending completion of the section 7(a)(2) requirements." *Id.* Invoking what it perceived as the "institutionalized caution mandate" of the ESA, the panel relieved the plaintiffs of any burden to prove an effect on salmon to obtain a substantive injunction against pesticide uses to produce food and fiber. The panel instead placed the burden on EPA to prove a negative – that its actions were nonjeopardizing. App. 18a. The panel also opined that, because Congress had already decided under the ESA that the balance of hardships "always tips sharply in favor of the endangered or threatened species," the district court was not required to balance interests (including, apparently, the public interests protected by FIFRA) when it issued the injunction suspending pesticide registrations in the buffer zones and imposing affirmative point-of-sale notice requirements on EPA and intervenors for pesticides used in urban areas. *Id.*

REASONS FOR GRANTING THE PETITION

In holding that APA standards do not apply in judging agency compliance with the ESA – including the purely procedural prescriptions that comprise the "violation" found here – the Ninth Circuit has created a patent and disturbing conflict in the Circuits on this important issue. Given the

number of environmental cases that find their way into the Ninth Circuit, the conflict in the Circuits is of enormous practical importance. The Ninth Circuit's ruling was here applied to 54 pesticides registered over nearly five decades[2] – eviscerating the agency's program of FIFRA regulatory approval of such pesticides. The practical, jurisprudential difficulty is equally stark: The Ninth Circuit's ruling means that an agency action that is – indeed is actually held to be – lawful and compliant with the ESA (as determined by a court properly reviewing agency action under the APA) can somehow, at the same time, be unlawful and in violation of the ESA. This conflict among the Circuits, and this erroneous ruling, should be resolved and corrected by this Court.

In addition – under whatever the appropriate standard of review – the finding of ESA "violations" here, and the ensuing injunction suspending pesticide registrations on account of EPA's asserted *procedural* violations of the ESA, has undermined basic, congressional policy. That policy of fostering food and fiber production through the reasonable use of pesticides is expressly affirmed in both the ESA and FIFRA. In connection with continued uses of registered pesticides, ESA implementation must take due account of the importance of pesticides in fostering food and fiber production. The courts' errors in construing and applying those two statutes should be corrected by this Court to effectuate Congress's goals of protecting wildlife while minimizing impacts on agriculture.

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[2] For example, atrazine first appeared in products registered under FIFRA in 1958. *See* Interim Registration Eligibility Decision for Atrazine, at 9 (2003), *available at* http://www.epa.gov/oppsrrd1/REDs/atrazine_ired.pdf.

I. The Ninth Circuit Erred in Refusing to Apply APA Standards.

A. The Ninth Circuit's refusal to apply APA standards conflicts with uniform decisions of the courts of appeals.

The Ninth Circuit's holding that the APA does not apply to claims brought "under the ESA citizen suit provision" creates a manifest conflict in the courts of appeals on a fundamental issue of nationwide importance: the proper standard and scope of judicial review in a suit against a federal agency alleged to be "in violation" of an environmental statute with a citizen suit provision. 16 U.S.C. § 1540(g).

Two decades ago, the D.C. Circuit, citing rudimentary principles of APA primacy established by this Court, articulated what has been, until this case, the uniform view of the courts of appeals that *de novo* judicial review is unavailable in such cases. *See Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982). In that ESA citizen suit, wildlife interest groups asserted that the U.S. Forest Service had violated the jeopardy standard of ESA § 7(a)(2) by failing to prepare an environmental impact statement before approving a plan for exploratory mineral drilling on Forest Service lands. The plaintiffs insisted that the decision to approve the drilling was subject to *de novo* judicial review because Congress had included a provision for citizen suits in the ESA and because *de novo* review would further Congress's intent to protect endangered species. The court found these arguments "unpersuasive":

> The citizen suit provision of the [ESA]...merely provides a right of action to challenge the agency

> action alleged to be in violation of the Act or to compel agency compliance with the requirements of the Act. It does not direct trial courts to conduct *de novo* review in adjudicating such actions and we decline to read such a requirement into the Act.
>
> Since the ESA does not specify a standard of review, judicial review is governed by section 706 of the Administrative Procedure Act.

Id. at 685.

The D.C. Circuit's holding comported with the views of the three Circuits – the Fifth, Sixth, and Eighth – which, at that relatively early stage in the ESA's litigation history, had addressed the standard of review for federal agency action challenged pursuant to the ESA. *Id.* at 686 (citing *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1074 n.21 (6th Cir.), *aff'd on other grounds*, 437 U.S. 153 (1978); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976); *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 372 (5th Cir. 1976)). And, these and other Circuits (including the Tenth and Eleventh) which have addressed the applicability of the APA to ESA citizen suits since that time have uniformly held that APA standards apply. *See, e.g., Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) (applying APA standard of "finality" of agency action); *Sierra Club v. Glickman*, 67 F.3d 90, 95 (5th Cir. 1995) ("the appropriate standard of review of federal administrative agency action under both § 7 and § 9 of the ESA is the arbitrary and capricious standard prescribed by the [APA]"); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004) (APA review standards apply to citizen suit alleging failure to consult under ESA § 7); *Gordon v. Norton*, 322 F.3d 1213, 1219 (10th Cir. 2003) ("APA governs judicial review of agency action challenged through

the ESA citizen-suit provision"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citizen suit challenge to adequacy of agency ESA § 7 consultation reviewed under APA's arbitrary and capricious standard).[3] The First and Federal Circuits have likewise decided cases that strongly support the conclusion that APA standards must be applied in suits alleging violations of the ESA. *See Water Keeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21, 31 (1st Cir. 2001) (collecting cases); *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1357 (Fed. Cir. 1998) (finding no ESA jurisdiction over a suit contesting the Department of State's procedural compliance with the ESA, because such cases arise under the APA).

The Ninth Circuit is now to the contrary with a ruling certain to have immediate and far-reaching implications for the lower courts and federal agencies, given the number of agency "actions" that might possibly give rise to a "violation" if reviewed without deference. The significant impacts of the ruling below are illustrated by the facts that ESA § 7(a)(2) encompasses *all* ESA-listed species, not just

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[3] Indeed, until this case, even the Ninth Circuit applied APA standards. *E.g.*, *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984) ("[b]ecause ESA contains no internal standard of review, section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, governs review of the Secretary's actions") (citing D.C. Circuit's ruling in *Cabinet Mts.*). *Accord Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 865 (9th Cir. 2004); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Svc.*, 340 F.3d 969, 973 (9th Cir. 2003); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001); *Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir 1990); *Sierra Club v. Marsh*, 816 F.2d 1376, 1384, 1386-87 (9th Cir. 1987).

salmon in the Pacific Northwest,[4] and that it applies to "any action" of "[e]ach Federal" agency, not just to EPA's registration of pesticides under FIFRA. Beyond that, many other federal statutes have citizen suit provisions that could, under the Ninth Circuit's reasoning, be deemed to supersede APA standards in suits against federal agencies.[5]

The Ninth Circuit's decision to depart from the uniform body of law warrants this Court's review.

B. The Ninth Circuit's refusal to apply APA standards conflicts with the APA.

Not surprisingly, given the lopsided weight of authority just discussed, the Ninth Circuit's holding that the APA does not apply conflicts with the APA itself. The APA waives sovereign immunity and authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Review takes place under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, agency conduct is presumed lawful and the "court is not empowered to substitute its judgment for

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[4] The U.S. Fish and Wildlife Service reports that there are 1083 animal species and 784 plant species listed as endangered or threatened under the ESA, dispersed throughout the world. *See* http://ecos.fws.gov/tess_public/TESSBoxscore (visited Sept. 15, 2005).

[5] *See, e.g.*, 15 U.S.C. § 2619 (Toxic Substances Control Act); 30 U.S.C. § 1270 (Surface Mining Control and Reclamation Act); 33 U.S.C. § 1365 (Clean Water Act); 42 U.S.C. § 4911 (Noise Control Act); *id.* § 6972 (Solid Waste Disposal Act); *id.* § 7604 (Clean Air Act); *id.* § 9659 (Comprehensive Environmental Response, Compensation, and Liability Act); *id.* § 11046 (Emergency Planning and Community Right-to-Know Act).

that of the agency." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

The Ninth Circuit's *de novo* approach overrode this and other related aspects of the APA, such as the requirement of 5 U.S.C. § 706 that review be based on the administrative record.[6] The district court (affirmed by the Ninth Circuit) declined to limit review to the administrative record, or even to consider that record. *See* App. 129a. Yet, for each pesticide registration, EPA had amassed a substantial administrative record that was not before the courts below – including data establishing that, "when used in accordance with widespread and commonly recognized practice [the ingredient] will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). *See also id.* § 136a(c)(1)-(2) (describing data requirements).

The failure to apply the APA affected the remedy as well. Assuming EPA had missed an ESA/APA deadline for some § 7-related procedure, "[t]he APA provides relief for a failure to act in § 706(1): 'The reviewing court shall...compel agency action unlawfully withheld or unreasonably delayed.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2378 (2004) ("*SUWA*"). The district court's 2002 order had already compelled the delayed actions by setting a time schedule for making "effects determinations" under 50 C.F.R. § 402.14(a). App. 145a-146a. In the challenged relief, the district court did more. The district court's 2004 injunction

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[6] *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (the "task of the reviewing court is to apply the appropriate standard of review...to the agency decision based on the record the agency presents to the reviewing court," not on a "new record made initially in the reviewing court").

effectively supplanted the FIFRA standards and process for suspending a pesticide registration. *See* Part II.B *infra*.

Although the Ninth Circuit ruled that the APA did not apply because this case was brought as a citizen suit, the APA itself addresses the issue whether its review provisions may be bypassed under color of a cause of action brought under some other statute. The APA's mandate precludes the Ninth Circuit's theory. The APA explicitly provides that a "[s]ubsequent statute may not be held to supersede" the provisions of the APA "except to the extent that it does so expressly." 5 U.S.C. § 559. Exceptions from the APA "are not lightly to be presumed in view of the statement in [§ 559] that modifications must be express." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

The ESA citizen suit provision does not contain an express exception to APA review standards. It merely provides a right to challenge agency action that is alleged to be in violation of that Act or to compel agency compliance with the Act's requirements. *See* 16 U.S.C. § 1540(g). Since the ESA does not specify a standard of review, it does not "expressly supersede," and therefore the agency action continues to be governed by, the arbitrary and capricious standard of the APA, 5 U.S.C. § 706, as the courts of appeals have (until this case) correctly concluded. *See, e.g., Cabinet Mts.*, 685 F.2d at 685. The Ninth Circuit's contrary holding – that "the APA does not govern the plaintiffs' claims" – conflicts with the plain language of the APA.

The Ninth Circuit's holding undercuts a major purpose of the APA – to maintain "a uniform approach to judicial review of administrative action." *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999) (citing 5 U.S.C. § 559 and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951)). And in doing so, it propounds illogic: Under the Ninth Circuit's

novel view, the same agency action that would be sustained in an APA review action as proper, lawful, and consistent with the agency's duty under the ESA (because the agency is found to be acting within the bounds of its discretion) could *at the same time* be deemed unlawful and in violation of the ESA under the Ninth Circuit's approach. This would be true (under the Ninth Circuit's holding here) even if the issue simply concerned a matter easily reviewable under the APA, namely the propriety of the process the agency used in reaching its decision. The Ninth Circuit panel missed the point of the APA. The APA is not merely a mechanism for reviewing agency action. Instead, it encapsulates the principle that federal agencies, not courts, are affirmatively empowered to decide certain questions within defined bounds – and courts may not supplant agency judgments in those areas. An agency action that is lawful and in compliance with the ESA under the APA's standards *cannot*, at the same time, be unlawful and "in violation" of the ESA.

C. The Ninth Circuit's refusal to apply APA standards conflicts with this Court's decisions delineating the scope of judicial review.

The Ninth Circuit's refusal to apply the APA conflicts with this Court's APA jurisprudence. Addressing a situation analogous to the one at bar, this Court has instructed that:

> [I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, ...consideration is to be confined to the administrative record and...no *de novo* proceeding may be held

United States v. Carlo Bianchi & Co., 373 U.S. 709, 713 (1963). Under the guiding APA precept, a court's role is to ascertain whether an agency's conduct is *reasonable*, not whether it is, in the court's own view, *right*. *See id.* at 715 (courts assess "the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body").

Further, as this Court has explained, *de novo* review is strictly limited under the APA, 5 U.S.C. § 706(2)(F), to two circumstances:

> First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

Overton Park, 402 U.S. at 415. The Ninth Circuit ignored these limitations here. EPA's conduct was "entitled to a presumption of regularity," *id.*, and should not have been subject to *de novo* judicial second-guessing. *Id.* at 419.

The Ninth Circuit's view that APA standards do not apply because EPA is sued as an alleged "violator" of the ESA, based on its failure "to consult," also runs afoul of this Court's analysis in *Bennett v. Spear*, 520 U.S. 154 (1997). There, the Court held that the "violation" on which an ESA citizen suit can be predicated "does not include the [Interior] Secretary's failure to perform his duties as administrator of the ESA." *Id.* at 173. The Court elaborated:

> [T]he ESA uses the term "violation" elsewhere in contexts in which it is most unlikely to refer to failure by the Secretary *or other federal officers and employees* to perform their duties in administering the ESA.... We know of no precedent for applying such a provision against those who administer (as opposed to those who are regulated by) a substantive law.

Id. at 173-74 (emphasis added).

Indeed, the distinction between a substantive and a procedural violation was lost on the courts below, which focused on EPA as a regulated entity, not an administering agency.[7] Since this case concerns only EPA's alleged failure to initiate "procedural" consultation at whatever time the plaintiffs demand, plaintiffs did not allege that EPA is a *substantive* violator of the ESA. At the very least, APA principles should govern judicial review of agency conduct where the alleged violation (unreasonable delay in making determinations on whether a particular pesticide "may affect" ESA-listed salmon or unreasonable delay in initiating ESA consultation with NMFS) is a procedural one. *See Earth Island Inst.*, 147 F.3d at 1357 (citing *Bennett*, and

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[7] The district court simply reasoned that the APA was irrelevant because EPA "must comply with, but not administer, the ESA" and is within the scope of a 16 U.S.C. § 1540(g)(1)(A) citizen suit. App. 130a. This reasoning does not withstand analysis. In reality, EPA and other action agencies at least co-administer ESA § 7(a)(2). Action agencies have the "initial responsibility for determining statutory necessity" for "consultation" under the statutory language – and that is why the Solicitor General previously represented to this Court that the Services' § 7 rules (50 C.F.R. Part 402) are not "binding" on agencies like EPA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992) (discussing 16 U.S.C. § 1536(a)(2)).

concluding that proper standard for ESA suit against action agency for failure to follow proper procedures was the APA).

II. The Courts' Findings of ESA Violations and Imposition of Further Injunctive Relief Misconstrue the ESA and FIFRA and Subvert Congress's Goal of Minimizing ESA Impacts on Food and Fiber Production.

Applying APA standards, there is little question but that this case would have come out differently.[8] However, even if the agency's actions here are judged *de novo*, without the benefit of deference to agency expertise and discretion, the Ninth Circuit was wrong. The Ninth Circuit misconstrued ESA § 7 to find "violations" in EPA's "failure to initiate consultation." Then, compounding that error, it upheld an injunction suspending long-approved uses of 54 pesticide

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[8] Besides limiting review to the administrative record, *see supra* note 6, the APA would have required the courts to: defer to EPA's experts and technical judgments on pesticide effects, *see Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376-78 (1989) and *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); accord EPA's conduct a presumption of regularity and place the burden on *plaintiffs* to prove otherwise, *see Overton Park*, 401 U.S. at 415; and respect the federal government's reasonable interpretations of the ESA and FIFRA, *see United States v. Mead*, 533 U.S. 218, 227-29 (2001) and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). In addition, the "principal purpose" of the APA limitations – "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both the expertise and information to resolve," *SUWA*, 124 S. Ct. at 2381 – would have counseled against an intricate prescriptive injunction, *see* App. 24a-33a, 36a-87a, that significantly interfered with EPA's program for regulating 54 pesticides in the Pacific Northwest.

ingredients even though neither the substantive nor the procedural standards for such suspensions under FIFRA had been met.

Whether confined to the Ninth Circuit, the site of much of this country's agricultural production *and* environmental litigation, or given broader reach by reason of the statutes' nationwide applicability, these holdings thwart Congress's goal of protecting agriculture against unwarranted ESA constraints. In an ESA amendment that neither court below took into account, Congress envisioned that ESA compliance for EPA's FIFRA program would "allow persons to continue production of food and fiber commodities" and would "minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators." Pub. L. No. 100-478, § 1010(b), 102 Stat. 2313 (1988), 7 U.S.C. § 136a note. The judicial suspension of authorized pesticide uses in this case drastically reorders these priorities by using what was at most a procedural default in the way EPA meets its ESA § 7(a)(2) obligations as the basis for a substantive injunction whose greatest impact falls not on EPA but on the production of agricultural commodities that Congress sought to protect.

For these reasons, and because of the recent proliferation of litigation presenting these issues,[9] this Court's review and

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[9] Lack of present consultation on alleged effects of pesticide registrations on salmon and other ESA-listed wildlife has been, or is, the basis for at least four other lawsuits against EPA, including two in the Ninth Circuit. *See Californians for Alternatives to Toxics v. EPA*, No. C-00-3150-CW (N.D. Cal.) (settled); *Ctr. for Biological Diversity v. Leavitt*, No. C-02-1580-JSW (N.D. Cal. Sept. 19, 2005); *Ctr. for Biological Diversity v. Johnson*, No. 1:04-cv-00126-CKK

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correction of the lower courts' errors, as described below, is warranted.

A. The finding of an ESA violation for failing to consult conflicts with the plain language of the ESA and its implementing regulations.

The district court held, and the Ninth Circuit affirmed, that "EPA's failure to initiate section 7(a)(2) consultation constitutes a substantial procedural violation of the ESA." App. 89a. The holding that *consultation was required* cannot be reconciled with the language of the ESA and the implementing regulations.

ESA § 7(a)(2) provides, in relevant part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any...[listed] species or result in the destruction or adverse modification of [designated critical] habitat of such species.

16 U.S.C. § 1536(a)(2). This provision creates no absolute duty to consult. Instead, it requires each federal agency to "insure" that any action it takes "is not likely to" cause jeopardy. "Consultation" with the Services, like the "assistance" the Services may provide to the action agency, is not a universal statutory duty before taking any and all federal actions. Rather, it is a potential vehicle for carrying

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(D.D.C.) (settled); *Natural Res. Def. Council v. EPA*, No. 1:03-cv-02444-RDB (D. Md.) (pending).

out the duty to "insure" that agency actions avoid jeopardizing ESA-listed species.

Consultation is a means to, or possible step in connection with, a substantive determination required by the ESA. It is not an independent requirement or statutory command, but rather a matter of agency judgment. The Ninth Circuit's view that consultation is an affirmative command is at odds with this Court's recognition that, "with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with the agencies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-69 (1992). Under the Services' joint regulations, an agency has considerable discretion in deciding whether, and if so when, to consult. To avoid imposing the "time delays and information responsibilities of formal consultation" on the thousands of innocuous actions/inactions/continuing actions that federal agencies take each day, the Services' rules implementing ESA § 7(a)(2) create a triage system that provides three levels of possible § 7(a)(2) review. 51 Fed. Reg. 19949-50 (June 3, 1986). *See* 50 C.F.R. §§ 402.13-.14.

First, no consultation process is required unless and until the action agency determines that its "action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a).

Second, if and when the action agency determines its action "may affect" a listed species, the agency may invoke the "optional process" of "informal consultation" with the Service. *Id.* § 402.13. Informal consultation serves twin purposes: it allows the Service and action agency to conclude that formal ESA consultation is not warranted because the action is "not likely to adversely affect listed species or critical habitat"; and it allows those agencies to resolve what information is required by § 402.14(c) and (d) to initiate

formal consultation. *Id.*

Third, the more rigorous "formal consultation" is reserved for proposed actions that pose closer issues of compliance with ESA § 7(a)(2)'s substantive constraints (*e.g.*, that each federal action be "not likely" to jeopardize the entire species' existence). Formal consultation is required only for actions the action agency determines are "likely to adversely affect any listed species or critical habitat," and is initiated only after the agency prepares the information required by § 402.14(c) and (d) at a depth acceptable to the Service. Only formal consultation results in the Service's issuance of a written "biological opinion" as to whether the proposed action complies with § 7(a)(2)'s substantive constraints and a statement authorizing some "incidental take." 50 C.F.R. § 402.14(h), (i); *see* 16 U.S.C. § 1536(b)(3), (4). ESA § 7(b)(1) (16 U.S.C. § 1536(b)(1)) and 50 C.F.R. § 402.14(e) and (g)(5) set time limits on the completion of formal consultation.[10]

The courts below, by concluding that in and of itself "EPA's failure to initiate section 7(a)(2) consultation constitutes a substantial procedural violation of the ESA," fundamentally misread the statute and rules to prescribe something that they do not. Under uncontested rules, "consultation" must be "initiate[d]" only if and after EPA concludes that a given pesticide registration "may affect" one or more of the ESA-listed salmon. 50 C.F.R.

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[10] Action agencies have discretion on the timing of consultation. *See* 51 Fed. Reg. 19948 ("informal consultation is an optional process that is under the control of the Federal agency as to its initiation and duration"); *id.* at 19949 (the "Service does not intend to mandate the timing of this [formal consultation] review, which is solely at the discretion of the Federal agency").

§ 402.14(a)-(d). In negating EPA's interpretation in connection with its administration of FIFRA in light of the ESA, the Ninth Circuit's approach highlights the intrusive nature of reviewing agency action *de novo*. But even if judged *de novo*, the Ninth Circuit's view of "consultation" as a separately enforceable and universal obligation, hence here a "violation" of the ESA, is simply wrong.

B. The injunctive suspension of pesticide uses is unlawful under FIFRA standards.

FIFRA sets the substantive standard by which EPA can suspend a pesticide registration. It authorizes EPA to compel interim "suspension" of a "registration of the pesticide immediately" where "necessary to prevent an imminent hazard during" the longer "time required for cancellation" proceedings. 7 U.S.C. § 136d(c)(1), (2). The "imminent hazard" definition is ESA-specific. It refers to an "*unreasonable hazard to the survival of species declared endangered or threatened*" under the ESA. 7 U.S.C. § 136(*l*) (emphasis added). This provision was amended by § 12(b) of the 1973 ESA itself. *See* Pub. L. No. 93-205, § 13(f), 87 Stat. 903 (1973). Besides creating this substantive threshold for ESA-based suspensions of pesticide registrations, FIFRA contains procedural protections for registrants. Before suspending a pesticide registration, EPA must give notice, including "findings pertaining to the question of 'imminent hazard,'" and must provide an opportunity for a hearing. 7 U.S.C. § 136d(c).

The district court's order granting further injunctive relief is a *de facto* partial suspension of the registrations of

the 54 pesticides.[11] Yet, the district court, and the Ninth Circuit in affirming the district court, did not adhere to the FIFRA standards. Whereas FIFRA predicates interim suspension upon a finding that the use of the pesticide "*will involve* unreasonable hazard to the survival of a species," 7 U.S.C. § 136(*l*) (emphasis added), the district court found only that EPA's pesticide registrations presented a "significant, *potential* harm" to salmon. App. 120a (emphasis added). And, since the court imposed the suspensions summarily, the pesticide registrants enjoyed none of the due process protections FIFRA guarantees before the licenses for their products can be suspended.

The Ninth Circuit's approach to an appropriate ESA injunction effectively bypasses the specific requirements of FIFRA. Since "Congress provided precisely the remedies it considered appropriate" in the comprehensive FIFRA with respect to ESA-listed species, and because the 2004 injunction is inconsistent with FIFRA's provisions governing pesticide suspension, the injunction cannot stand. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). It is FIFRA's ESA-based suspension provision, not the doctrine of "institutionalized caution" the Ninth Circuit invoked, App. 18a, that embodies the legislative balance germane to this case, between species protection and food and fiber production.[12] Here, without

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[11] The operative language of the order states that, except in certain narrow circumstances, "EPA's authorization of any use" of 54 pesticides in the buffer zones "is hereby ENJOINED, VACATED, AND SET ASIDE" pending compliance with ESA § 7(a)(2), App. 24a; *see id.* at 33a-34a (describing terminating events).

[12] The doctrine of "institutionalized caution" derives ultimately from *dicta* in *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("*TVA v. Hill*"), the snail darter case. That case did *not* involve the

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even finding a substantive violation of the ESA, but only a procedural failure, the Ninth Circuit has upended Congress's fundamental policy choice about the balance between species protection and the human population's need for nutritional sustenance. This Court's review is warranted to reflect and restore that critical balance.

(continued) . . .

unique balance Congress struck in FIFRA between wildlife protection and food and fiber production, but rather a mandate the Court found in the ESA when considered against public works legislation that, unlike FIFRA, did *not* address ESA constraints or establish a countervailing interests. Moreover, *TVA v. Hill* involved the extreme circumstance in which all parties conceded that the agency action (operation of the Tellico dam) would cause the "*eradication*" of an endangered species and its sole critical habitat. *See id.* at 173-74 (emphasis in original). Here, in contrast, there is no concession on effects on salmon; and all the district court found was "potential" harm to some fish, not actual species eradication. App. 120a. Further, there is no substantive violation of ESA § 7(a)(2) here, but at most only a procedural default in the timing of making certain determinations under the ESA. As in an earlier case reversing the same court of appeals on an injunction, here too the "Ninth Circuit erroneously relied on *TVA v. Hill*," which involved a "distinguishable" situation. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-35138, 04-35212, 04-35237, 04-35244.

WASHINGTON TOXICS COALITION;
Northwest Coalition for Alternatives to Pesticides;
Pacific Coast Federation of Fishermen's Associations, Inc.;
Institute for Fisheries Resources,

Plaintiffs-Appellees,

v.

ENVIRONMENTAL PROTECTION AGENCY;
Christine Todd Whitman,

Defendants,

and

California Plant Health Association;
Oregon Agricultural Chemicals & Fertilizers Association;
Far West Agribusiness Association;
Agricultural Cooperative Council of Oregon;
Fruit Growers League of Southern Oregon;
Hood River Grower-Shipper Association;
Hop Growers of Washington;
Idaho Mint Growers Association;
Malheur County Onion Growers Association;
National Potato Council, Orchard View Farms;
Oregon Alfalfa Seed Growers Association;
Oregon Cranberry Farmers' Alliance;
Oregon Hop Growers Association;
Oregon Horticultural Society; Oregon Seed Council;
USA Dry Pea & Lentil Council;

Wasco County Fruit & Produce League;
Washington Association of Wheat Growers;
Washington Mint Growers Association;
Washington State Horticultural Association;
Western Washington Agricultural Association;
Oregon Dairy Farmers; American Forest Resource Council;
Oregon Forest Industries Council;
Washington Friends of Farms and Forests;
Oregonians for Food and Shelter; Western Washington
Golf Course Superintendents Association;
National Agricultural Aviation Association;
California Agricultural Aircraft Association;
Croplife America,

Defendant-Intervenors-Appellants.

Washington Toxics Coalition;
Northwest Coalition for Alternatives to Pesticides;
Pacific Coast Federation of Fishermen's Associations, Inc.;
Institute For Fisheries Resources,

Plaintiffs-Appellees,

v.

Environmental Protection Agency;
Christine Todd Whitman,

Defendants,

California Plant Health Association; Croplife America,

Defendant-Intervenors,

and

Washington State Potato Commission,

Defendant-Intervenor-Appellant.

Washington Toxics Coalition;
Northwest Coalition for Alternatives to Pesticides;
Pacific Coast Federation of Fishermen's Associations, Inc.;
Institute for Fisheries Resources,

Plaintiffs-Appellees,

v.

Environmental Protection Agency;
Christine Todd Whitman,

Defendants,

Croplife America, et al,

Defendant-Intervenor,

and

Washington State Farm Bureau,

Defendant-Intervenor-Appellant.

Washington Toxics Coalition;
Northwest Coalition for Alternatives to Pesticides;
Pacific Coast Federation of Fishermen's Associations, Inc.;
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Environmental Protection Agency;
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Idaho Mint Growers Association;
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Oregon Cranberry Farmers' Alliance;
Oregon Farm Bureau Federation;
Oregon Hop Growers Association;
Oregon Horticultural Society; Oregon Seed Council;
USA Dry Pea & Lentil Council;
Wasco County Fruit & Produce League;
Washington Association of Wheat Growers;
Washington Mint Growers Association;
Washington State Horticultural Association;
Western Washington Agricultural Association;
Oregon Cattlemen's Association; Oregon Dairy Farmers:
American Forest Resource Council;
Oregon Forest Industries Council;
Washington Friends of Farms and Forests;
Oregonians for Food and Shelter; Western Washington
Golf Course Superintendents Association;
National Agricultural Aviation Association;
California Agricultural Aircraft Association;
Washington State Potato Commission;
Washington State Farm Bureau; Syngenta Corp Protection;
Croplife America,

Defendant-Intervenors.

Argued and Submitted Sept. 14, 2004.
Filed June 29, 2005.

This litigation is about the Environmental Protection Agency's registration of 54 pesticide active ingredients that the plaintiff environmental coalitions fear may harm endangered or threatened salmon and steelhead in the waters of the Pacific Northwest. The plaintiffs, Washington Toxics Coalition et al., ("WTC"), contend that EPA violated the Endangered Species Act, 16 U.S.C. § 1536(a)(2), by failing to consult with the National Marine Fisheries Service before approving the pesticides.

EPA admittedly did not do any such consultation, and it agrees that the Endangered Species Act requires consultation with the National Marine Fisheries Service for action affecting these endangered or threatened fish. EPA contends, however, that because in registering the pesticides, it complied with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136, *et seq.*, it was not bound by the consultation requirements of the Endangered Species Act ("ESA"). EPA therefore appeals the district court's orders requiring EPA to engage in consultation and suspending EPA's authorization of the pesticides pending the consultation.

Plaintiffs Washington Toxics Coalition and Northwest Coalition for Alternatives to Pesticides are non-profit organizations that promote alternatives to toxic pesticides and seek to protect the environment from the harmful effects of pesticides. Plaintiff Pacific Coast Federation of Fishermen's Associations, Inc., is an organization of commercial fishermen that works to ensure the long-term survival of commercial fishing as a way of life. Plaintiff Institute for Fisheries Resources is a non-profit public interest marine resources protection and conservation organization.

A number of parties intervened in the action on the side of defendant EPA. The defendant-intervenors are CropLife America ("CLA"), Washington State Farm Bureau, and 35 other groups representing pesticide manufacturers, formulators, distributors, sellers, and applicators. The intervenors contend that the case is governed by the principles of judicial review and injunctive standards of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 700, *et seq.*, rather than by the ESA. According to the intervenors, the district court lacked jurisdiction to examine the effect of pesticides apart from reviewing the administrative record pursuant to a cause of action established by the APA. Intervenors so contend despite the provision of the ESA creating individual causes of action to challenge its violations. *See* 16 U.S.C. § 1540(g)(1). The intervenors also contend that the injunctive relief granted by the district court was excessive. They challenge various aspects of the district court's injunctive orders requiring pesticide-free buffer zones around endangered salmon and steelhead habitat.

The district court granted the plaintiffs' requests for injunctive relief in a series of well-crafted orders, after allowing all parties, including the intervenors, to introduce evidence on the effects of the use of the challenged pesticides. Although the complaint originally disputed registration of hundreds of pesticides, the district court held EPA violated the ESA consultation requirement with respect to only 54 pesticide active ingredients. The district court ordered EPA to initiate and complete consultation regarding the effects of those pesticide registrations on threatened and endangered salmon and steelhead according to a schedule set out in the opinion. Because it viewed the procedural violation of the ESA to have been a substantial violation authorizing extraordinary relief, the district court also enjoined EPA's authorization of any use of the pesticides within proscribed distances of salmon-supporting

waters in California, Oregon, and Washington, pending EPA's fulfillment of its consultation obligations.

We affirm the district court's orders in their entirety.

FACTUAL AND PROCEDURAL BACKGROUND

The National Marine Fisheries Service ("NMFS") since 1989 has classified approximately 25 species of salmon and steelheads, collectively known as salmonids, as "endangered" or "threatened" throughout the Pacific Northwest. The NMFS has determined that pesticides may kill or injure salmonids, and may affect future salmonid behavior and reproductive success. *See, e.g.*, 65 Fed.Reg. 42,422, 42,473 (2000). The district court found that scientific or competent declaratory evidence in the record demonstrated a causal link between the 54 pesticide active ingredients at issue in this case and direct or indirect adverse effects on salmonid populations. This is not disputed on appeal.

What is disputed is the applicability of ESA section 7(a)(2):

> Each agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . .

16 U.S.C. § 1536(a)(2). Plaintiff WTC claims that EPA violated this section when EPA failed to consult with the applicable agency, the NMFS, about the registration of pesticide active ingredients potentially harmful to endangered or threatened salmonids. EPA maintains that it is not bound by the provision.

WTC filed this suit in 2001 under an ESA provision known as the ESA citizen suit provision and frequently used to compel agency action. It allows individuals to bring suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof." 16 U.S.C. § 1540(g)(1). *See Bennett v. Spear*, 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079 (9th Cir.2001). WTC's complaint alleges that "EPA is violating § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. Part 402, by failing to consult with NMFS regarding the effects of pesticide use under EPA pesticide registrations that 'may affect' endangered and threatened salmon and steelhead and/or their critical habitat."

EPA regulates pesticides under FIFRA, 7 U.S.C. §§ 136, *et seq.* We have observed that FIFRA sets forth a comprehensive regulatory scheme for controlling the use, sale, and labeling of pesticides. *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204 (9th Cir.2002). It bars any person in any state from distributing a pesticide EPA has not registered or exempted pursuant to FIFRA. 7 U.S.C. § 136a(a). FIFRA establishes the procedures through which EPA registers pesticides, labels pesticides, and cancels the registration of pesticides. *See* 7 U.S.C. § 136a-d. EPA took the position that only FIFRA, and not the ESA, governs the rescission of pesticide registrations.

Both sides moved for summary judgment. The parties submitted voluminous filings on the effect of the various pesticides on endangered or threatened salmonids. The district court ruled that WTC had standing only to challenge the 54 pesticides for which it offered competent declaratory evidence

demonstrating a causal link between EPA registration and harm to salmonid. That ruling is not at issue before us.

The district court also ruled that EPA was required to comply with the ESA, as well as with FIFRA. The district court rejected EPA's contention that WTC could challenge only EPA compliance with the pesticide registration provisions of FIFRA. The district court thus concluded that the ESA applies to agency actions taken pursuant to FIFRA, and that where endangered species may be affected, WTC could maintain a challenge to EPA's failure to consult under the ESA.

The district court held that as a matter of law, EPA violated section 7(a)(2) with respect to the disputed 54 pesticide active ingredients. Section 7(a)(2) consultation requirements apply to "each federal agency" and to "any action authorized, funded, or carried out by that agency." 16 U.S.C. § 1536(a)(2). The district court held that this comprehensive language includes EPA, and that EPA, having provided no evidence of formal or informal consultation as required by section 7(a)(2), violated the ESA. The district court ordered EPA to initiate and complete section 7(a)(2) consultation according to a prescribed schedule.

The district court also rejected the intervenors' arguments that the case could arise only under the APA. The intervenors argued that the proceeding contravened APA standards because the district court conducted its review outside an administrative record, without identifying any final agency actions or inactions under review, and without applying the APA's deferential standard of judicial review. The district court held that because the ESA independently authorized a right of action, the APA was inapplicable. *See* 16 U.S.C. § 1540(g)(1).

In subsequent orders, the district court granted WTC's motion for further, interim relief, holding such injunctive relief necessary to fulfill what we have termed the "institutionalized

caution mandate[ ]" of the ESA. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir.1987). The district court relied on established law authorizing agency actions to continue during the section 7(a)(2) consultation process only if the actions are non-jeopardizing to the protected species and will not result in a substantive violation of the ESA. *See id.; Thomas v. Peterson*, 753 F.2d 754, 764-65 (9th Cir.1985). The district court held that EPA did not meet its burden of showing that the 54 registrations were non-jeopardizing.

After a hearing and consideration of voluminous evidence bearing on the appropriate scope of injunctive relief, the district court entered an order that enjoined "EPA's authorization of any use of any pesticide identified in this order within 20 yards, or authorization of any aerial application within 100 yards, of any Salmon Supporting Waters in California, Oregon, and Washington." The order exempted pesticide uses EPA has determined to have "no effect" on the endangered species, and exempted particular uses "not likely to adversely affect" the endangered species. The district court also granted further injunctive relief for certain pesticides in urban areas, and required EPA and the intervening defendants to provide a specified point-of-sale notification to urban distributors of those pesticides.

The injunction provided that it would terminate automatically on (1) completion by EPA of its ESA section 7(a)(2) consultation requirements, (2) issuance by NMFS of a biological opinion, (3) a finding by EPA for ESA section 7(a)(2) purposes that the pesticide is "not likely to adversely affect" the endangered or threatened species, or (4) a finding by EPA for ESA section 7(a)(2) purposes that the pesticide will have "no effect" on the endangered or threatened species. EPA and the intervenors on appeal challenge the applicability of the ESA requirements and the breadth of the injunctive relief ordered by the district court.

DISCUSSION

I. Applicability of ESA Requirements

EPA argues on appeal, as it maintained in the district court, that it is bound to follow only the provisions of FIFRA, which include a limited provision dealing with endangered species. Under FIFRA, any interested person can petition EPA to cancel a registered pesticide. *See* 40 C.F.R. § 154.10. FIFRA allows EPA to suspend a registration immediately for an "imminent hazard," including an "unreasonable hazard to the survival of a species declared endangered or threatened" under the ESA. 7 U.S.C. § 136d(c)(1)- (2); § 136(*l*).

EPA argues that ESA section 7(a)(2) does not confer independent responsibilities on EPA to comply with ESA provisions. That section provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . .

16 U.S.C. § 1536(a)(2).

This circuit has not yet decided whether EPA's regulation of a pesticide under FIFRA bars a suit under the ESA asserting that the continued use of the pesticide violates the ESA. The Eighth Circuit has, however, and it has decided there is no bar. In *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir.1989), environmental organizations brought suit against EPA under the ESA, challenging the continued registration of above-ground pesticides containing strychnine. The EPA, as in this case, argued that the plaintiffs were limited to seeking a cancellation of strychnine registrations under FIFRA. *Id.* at

1298. The Eighth Circuit rejected EPA's position, holding that FIFRA does not exempt EPA from compliance with the ESA requirements when EPA registers pesticides. *Id.* at 1299. Therefore, the Eighth Circuit concluded that the ESA citizen suit provision permitted the plaintiffs to sue EPA to enjoin the alleged violation of the ESA. *Id.* at 1300. We agree with the Eighth Circuit that even though EPA registers pesticides under FIFRA, it must also comply with the ESA when threatened or endangered species are affected. *See id.* at 1299-1300.

This conclusion is consistent with our own prior holdings that compliance with FIFRA requirements does not overcome an agency's obligation to comply with environmental statutes with different purposes. For example, we have held that the registration and labeling of a substance under FIFRA does not exempt a party from its obligations under the Clean Water Act ("CWA"), 33 U.S.C. § 1342, to obtain a permit to discharge that substance. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). We reasoned that the statutes have different and complementary purposes. *Id.* at 531-32. FIFRA's objective is to protect human health and prevent environmental harm from pesticides through a cost-benefit analysis of the pesticides. *Id.* The CWA's objective is to restore and maintain the integrity of the Nation's waters based on a determination that the discharge of the pollutant satisfies the limitations that EPA has imposed to protect water quality. *Id.*

For the same reasons, we also have held that the registration and labeling of a substance under FIFRA does not exempt an agency from its obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. *Oregon Envtl. Council v. Kunzman*, 714 F.2d 901, 905 (9th Cir.1983); *see also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir.1984). We concluded that a pesticide registration under FIFRA does not require the same

examination of environmental concerns that an agency is required to make under NEPA. *See id.* at 1248.

The statutes at issue in this case similarly have different but complementary purposes. FIFRA utilizes a cost-benefit analysis to ensure that there is no unreasonable risk created for people or the environment from a pesticide, taking into account the economic, social, and environmental costs and benefits of a pesticide's use. *Headwaters, Inc.*, 243 F.3d at 532. In contrast, the ESA affords endangered species the "highest of priorities" in assessing risks and benefits. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The reasoning of our case law therefore leads us to conclude that an agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives.

EPA also makes a corollary argument with respect to the remedy. It contends that it does not have any discretion to cancel a pesticide's use except through the regulatory framework in FIFRA, and that the district court therefore erred by granting injunctive relief under the ESA. EPA contends, in effect, that once a pesticide has been approved for use under FIFRA, EPA lacks discretion to meet any other legal obligations. For this remarkable conclusion EPA relies on cases in which the agency action had been completed and there was no ongoing regulatory authority. For example, in *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir.2001), we held that the United States Fish and Wildlife Service did not have discretion to comply with the ESA regarding a permit that it had already granted and did not retain discretionary control to alter. Similarly, in *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir.1995), we held that the Bureau of Land Management did not have discretion to comply with the ESA regarding a right-of-way it had already granted by contract to a

private entity before passage of the ESA. We have expressly observed that in both of those cases, the agency activity had been completed and was not ongoing. *See, e.g., Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir.2003).

The principle enunciated in those cases does not apply here. This is because here EPA retains ongoing discretion to register pesticides, alter pesticide registrations, and cancel pesticide registrations. *See* 7 U.S.C. § 136a-d. Because EPA has continuing authority over pesticide regulation, it has a continuing obligation to follow the requirements of the ESA. We have respected such continuing obligations in well-reasoned authority that binds us here. In *Turtle Island, supra,* environmental organizations brought suit against the NMFS, alleging that the issuance of fishing permits pursuant to the High Seas Fishing Compliance Act, 16 U.S.C. §§ 5501-5509, required consultation under the ESA. We recognized that the ESA consultation requirement applies only if the agency has the discretionary control "to inure to the benefit of a protected species." 340 F.3d at 974. We held that the Compliance Act permit decisions were ongoing agency actions because they entailed an "ongoing and lasting effect" and because the NMFS *could* condition permits to benefit listed species. *Id.* at 977; *see also Pac. Rivers Council v. Thomas,* 30 F.3d 1050, 1053 (9th Cir.1994).

In this case, EPA has similar discretion "to inure to the benefit" of listed species. Pesticide registrations under FIFRA are ongoing and have a long-lasting effect even after adoption. EPA retains discretion to alter the registration of pesticides for reasons that include environmental concerns. *See* 7 U.S.C. §§ 136d(c)(1)-(2), 136(*l*). Therefore, EPA's regulatory discretion is not limited by FIFRA in any way that would bar an injunction to enforce the ESA.

Finally, EPA argues that administrative exhaustion or primary jurisdiction under FIFRA applies in this case, and that the district court should first have required the plaintiffs to exhaust FIFRA remedies before entering an injunction. FIFRA, of course, contains a limited administrative remedy. Section 136d(c) of FIFRA allows the Administrator to suspend a pesticide creating an "unreasonable hazard to the survival of a species declared endangered or threatened by the Secretary pursuant to the Endangered Species Act" without following the normal procedural requirements of FIFRA. 7 U.S.C. §§ 136d(c)(1)-(3), 136(*l*). Under FIFRA any interested person can petition EPA for cancellation of a pesticide. *See* 40 C.F.R. § 154.10. Neither FIFRA nor the ESA, however, suggest any legislative intent to require exhaustion of the FIFRA remedy before seeking relief under the ESA. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (exhaustion is required only where Congress' intent to allocate review to an administrative body is "fairly discernible in the statutory scheme").

As the district court concluded, the mere fact that FIFRA recognizes EPA authority to suspend registered pesticides to protect listed species does not mean that FIFRA remedies trump those Congress expressly made available under ESA, or that FIFRA provides an exclusive or primary remedy. The scheme of the two statutes suggests the exact opposite. Indeed, this court has allowed plaintiffs to challenge whether agency pesticide permit decisions comply with other environmental statutes, even though the plaintiffs did not first pursue administrative remedies under FIFRA. *See Headwaters*, 243 F.3d at 530-32 (challenging EPA compliance with Clean Water Act); *Merrell v. Thomas*, 807 F.2d 776 (9th Cir.1986) (challenging EPA compliance with National Environmental Policy Act). EPA and the intervening defendants cite no relevant authority supporting their position. The doctrines of

exhaustion of remedies and primary jurisdiction are inapplicable in this case.

II. Applicability of APA

Intervenor CLA argues that the district court erred by not applying the APA and its limited provision for judicial review of final agency action. The APA provides judicial review for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The district court correctly held, however, that the ESA citizen suit provision creates an express, adequate remedy. That provision states: "[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1). Because this substantive statute independently authorizes a private right of action, the APA does not govern the plaintiffs' claims. Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA. *See, e.g., Pac. Rivers Council,* 30 F.3d at 1056; *Peterson,* 753 F.2d at 763-64.

III. Challenges to Scope of Injunctive Relief

The intervenors scatter a number of challenges to the scope of relief that amount to the contention that, although the district court could order the agency to comply with the ESA, it had to permit the continuing use of the pesticides during consultation. The purpose of the consultation process, however, is to prevent later substantive violations of the ESA. *Sierra Club v. Marsh,* 816 F.2d at 1389. The remedy for a substantial procedural violation of the ESA--a violation that is not technical or de minimis--must therefore be an injunction of the project pending compliance with the ESA. *Id.; Peterson,* 753 F.2d at 764. It is well-settled that a court can enjoin agency action pending

completion of section 7(a)(2) requirements. *See Sierra Club v. Marsh*, 816 F.2d at 1389; *Peterson*, 753 F.2d at 765.

ESA section 7(d) also belies the intervenors' contention that further injunctive relief could not be granted during consultation. Section (7)(d) states:

> After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d). Section 7(d) was enacted to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species. *See, e.g., Pac. Rivers Council v. Thomas*, 936 F.Supp. 738, 745 (D.Idaho 1996). There is no irreversible or irretrievable commitment of resources at issue in the present case. Rather, it is the very maintenance of the "status quo" that is alleged to be harming the endangered species.

The intervenors also argue that the district court erred by assigning EPA the burden of showing that its actions were non jeopardizing to endangered or threatened species, and instead should have made the plaintiffs demonstrate "imminent irreparable harm" or "substantial and immediate irreparable injury." The intervenors alternatively argue that the district court did not properly balance the interest in protecting endangered species against the costs of the injunction when crafting the scope of the injunction.

We have held that the appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA. *See Peterson,* 753 F.2d at 764. We have also allowed non-jeopardizing agency actions to continue during the consultation process. *See, e.g., Sierra Club v. Marsh,* 816 F.2d at 1376. We have not expressly stated who bears the burden of showing that the action is non-jeopardizing, but the burden should be on the agency, the entity that has violated its statutory duty.

Placing the burden on the acting agency to prove the action is non-jeopardizing is consistent with the purpose of the ESA and what we have termed its "institutionalized caution mandate[ ]." *Sierra Club v. Marsh,* 816 F.2d at 1389. We said as much in *Thomas v. Peterson,* where the defendant, the U.S. Forest Service, urged the district court to conclude that absent proof by the plaintiffs to the contrary, a proposed project was not likely to affect an endangered or threatened species. 753 F.2d at 765. We held that this was an inappropriate finding for the district court to make. *Id.* "It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed." *Id.* The district court correctly assigned EPA the burden of proving that its actions were non-jeopardizing.

The district court was not required to balance interests in protecting endangered species against the costs of the injunction when crafting its scope. Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species. *See Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1073 (9th Cir.1996).

Finally, the EPA challenges protective measures for urban pesticide sales. The district court concluded that for the use of certain pesticides in urban areas, buffers alone are an

insufficient remedy to ensure that jeopardy to endangered salmonids will be avoided. Rather than completely banning those pesticides in urban areas, the district court required EPA to develop and distribute point-of-sale notifications detailing pesticide harm to salmonids. EPA nevertheless argues this portion of the injunction impermissibly impinges on its authority.

The injunctive relief granted was well within the district court's discretion to require compliance with the ESA and to tailor a remedy pursuant to Federal Rule of Civil Procedure 65. *See United States v. Olander*, 584 F.2d 876, 880-81 (9th Cir.1978), *vacated on other grounds*, 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979).

CONCLUSION

For the foregoing reasons, we affirm the district court's orders enjoining EPA pending its compliance with the ESA section 7(a)(2) consultation requirements.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C01-0132C

WASHINGTON TOXICS COALITION,
NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES,
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
and INSTITUTE FOR FISHERIES RESOURCES,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY,
and MIKE LEAVITT, ADMINISTRATOR,

Defendants,

v.

AMERICAN CROP PROTECTION ASSOCIATION, et al.,

Intervenor-Defendants.

January 22, 2004

ORDER

This matter is before the Court on Plaintiffs' motion for further injunctive relief. Having considered the briefs and arguments of the parties, and the entire record in this matter, and based on the Court's orders dated July 16, 2003 and August 8, 2003, and the oral argument held on August 14, 2003, the Court finds that further injunctive relief is appropriate to prevent potential adverse effects of certain pesticide active

ingredients on threatened and endangered salmonids, and therefore GRANTS Plaintiffs interim injunctive relief as follows:

I. PERTINENT PESTICIDE ACTIVE INGREDIENTS AND SPECIES OF SALMONIDS

This Court's order of July 2, 2002 imposes a schedule upon the Environmental Protection Agency ("EPA") to make effects determinations and to consult, as appropriate, with the National Marine Fisheries Service ("NMFS") in connection with the effects of pesticides containing any of 54 active ingredients on salmon and steelhead listed as threatened or endangered under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544.[1] The 54 active ingredients ("Pesticides") subject to the July 2, 2002 order are:

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[1] The July 2, 2002 Order, July 16, and August 8, 2003 Orders, and this Order apply to the following 26 Evoluntionarily Significant Units of salmon and steelhead listed as threatened or endangered unde4r the ESA (the "Salmon ESUs"): the Puget Sound, Upper Columbia River spring-run, Lower Columbia River, and Upper Willamette River chinook (64 Fed. Reg. 14,308 (March 24, 1999)); California Central Valley spring-run chinook and California coastal chinook (64 Fed. Reg. 50,394 (Sept. 16, 1999)); Hood Canal summer-run chum and Columbia River chum (64 Fed. Reg. 14,508 (March 25, 1999)); Ozette Lake sockeye (64 Fed. Reg. 14,528 (March 25, 1999)); Oregon coast coho (63 Fed. Reg. 42,587 (Aug. 10, 1998)); Upper Columbia River, Snake River Basin, Southern California, South Central California coast and Central California coast steelhead (62 Fed. Reg. 43,937 (August 18, 1997)); Lower Columbia River and California Central Valley steelhead (63 Fed. Reg. 13,347 (March 19, 1998)); Upper Willamette and Middle Columbia River steelhead (64 Fed. Reg. 14,517 (March 25, 1999)); Northern California steelhead (65 Fed. Reg. 36,074 (June 7, 2000)); Sacramento River winter-run chinook (59 Fed. Reg. 440 (Jan. 4, 1994)); Snake River fall-run chinook (57 Fed. Reg. 14,653 (April 22, 1992); Snake River spring/summer-run chinook (57 Fed. Reg. 14,653 (April 22, 1992)); Central California coast coho (64 Fed. Reg. 24,049 (May 5, 1999)); Southern Oregon/Northern California coast coho (62 Fed. Reg. 24,588 (May 6, 1997)); and Snake River sockeye (56 Fed. Reg. 58,619 (Nov. 20, 1991)).

1-3-dichloropropene
2,4-D
acephate
alachlor
atrazine
azinphos-methyl
bensulide
bentazon
bromoxynil
captan
carbaryl
carbofuran
chlorothalonil
chlorphyrifos
coumaphos
diazinon
dicamba
dichlobenil
diflubenzuron
dimethoate
disulfoton
diuron
ethoprop
fenamiphos
fenbutatin-oxide
iprodione
lindane
(gamma-BHC and HCH)
linuron
malathion
methamidophos
methidathion
methomyl
methyl parathion
metolachlor
metribuzin
molinate
naled
norflurazon
oryzalin
oxyfluorfen
paraquat dichloride
pebulate
pendimethalin
phorate
phosmet
prometryn
propargite
simazine
tebuthiuron
terbacil
thiobencarb
thiodicarb
triclopyr (BEE and TEA)
trifluralin

II. SALMON SUPPORTING WATERS

This Order granting injunctive relief shall apply to "Salmon Supporting Waters" within the range of the Salmon

ESUs as identified by NMFS in its critical habitat designations[2] in Washington, Oregon, and California. For purposes of this Order, "Salmon Supporting Waters" are defined as the area below the ordinary high water mark of all streams, lakes, estuaries, and other water bodies where salmon are ordinarily found at some time of the year. For Washington and Oregon, the Streamnet database identifies Salmon Supporting Waters as

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[2] Critical habitat designations for the Puget Sound, Lower Columbia River, Upper Willamette River, Upper Columbia River spring-run, California Central Valley spring-run, and California coastal chinook salmon; Hood Canal summer-run and Columbia River chum salmon; Ozette Lake sockeye salmon; Oregon coast coho salmon; and Southern California, South-Central California coast, Central California coast, California Central Valley, Upper Columbia River, Snake River Basin, Lower Columbia River, Upper Willamette River, and Middle Columbia River steelhead are at 65 Fed. Reg. 7764 (Jan. 13, 2000). The revised critical habitat designation for the Snake river spring/summer chinook salmon is at 64 Fed. Reg. 57,399 (Oct. 25, 1999) (original designation at 57 Fed. Reg. 14,653 (April 22, 1992)). Critical habitat designations for the Central California coast and Southern Oregon/Northern California coasts coho salmon are at 64 Fed. Reg. 24,049 (May 5, 1999). Critical habitat designations for the Snake River sockeye salmon and Snake River fall chinook salmon are at 58 Fed. Reg. 68,543 (Dec. 28, 1993). The critical habitat designation for the Sacramento River winter-run chinook salmon is at 58 Fed. Reg. 33,212 (June 16, 1993). Although some of these critical habitat designations have been vacated and will be redesignated, *see* 68 Fed. Reg. 55,900 & 55,926 (Sept. 29, 2003), the designations accurately define the geographic range of the species. NMFS has not designated critical habitat for the extended range of the Southern California steelhead ESU southward to the United States-Mexican border, but the ESU's range, for purposes of the definition of "Salmon Supporting Waters," includes the San Mateo Creek and Topanga Creek watersheds, which is the basis for extending the ESU range. 67 Fed. Reg. 21,586, 21,596-97 (May 1, 2002). NMFS has not designated critical habitat for Northern California steelhead, but the ESU's range, for purposes of the definition of "Salmon Supporting Waters," includes the critical habitat designation for the California coastal chinook salmon, *see* 65 Fed. Reg. 7764, with the southernmost boundary being the Gualala River (inclusive) in Mendocino County for Northern California steelhead, rather than the Russian River in Sonoma County for the California coastal chinook.

defined in this Order.[3] For California, the U.S. Geological Survey National Hydrography database identifies Salmon Supporting Waters as defined in this Order.[4] Estuaries used by listed salmon and steelhead are included in Salmon Supporting Waters even if they are not identified in the Streamnet or U.S. Geological Survey National Hydrography databases.

III. INJUNCTIVE RELIEF

A. *Buffers*

1. The Court finds that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids. (August 8, 2003 Order at 16, Dkt. No. 159.) The Court further finds that 20-yard buffer zones for ground use and 100-yard buffers for aerial applications will substantially contribute to the prevention of jeopardy. (*Id.* at 18.) Accordingly, except as provided below and in Sections III.B. through III.D., EPA's authorization of any use of any Pesticide identified in Section I of this Order within 20 yards, and EPA's authorization of any aerial application within 100 yards, of any Salmon Supporting Waters in California, Oregon, and Washington, is hereby ENJOINED, VACATED, and SET ASIDE. This injunction shall not be lifted until this Order is terminated, in whole or in part, as provided in Section VI or by other order of the Court.

2. Plaintiffs did not seek, and this Court does not grant, any further injunctive relief for Pesticide uses for which EPA

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[3] The Streamnet database is a cooperative venture of state and tribal fish and wildlife agencies in the Pacific Northwest and is administered by the Pacific States Marine Fisheries Commission. It is accessible at http://www.streamnet.org.

[4] The U.S. Geological Survey database is accessible at http://nhd.usgs.gov. The Streamnet database does not include California streams.

has in place a "no effect" determination for a particular Salmon ESU.[5]

3. This injunction does not apply to any Pesticide uses in a particular Salmon ESU where EPA has determined, for purposes of ESA § 7 compliance, that the Pesticide Use is "not likely to adversely affect" the particular Salmon ESU, provided that the National Marine Fisheries Service has not rejected or affirmatively failed to concur in the "not likely to adversely affect" determination.[6]

B. *Buffer Variations*

Based on EPA's effects determinations, the stipulations of plaintiffs, or the evidence in the record, the Court determines that the following specific injunctive relief is appropriate for the particular uses specified below instead of the injunctive relief provided for in Section III.A.1. EPA's authorization of the Pesticide uses specified below in ENJOINED, VACATED,

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[5] As of the date of this Order, the following Pesticides have received "no effect" determinations for all Salmon ESUs and are therefore excluded from this injunctive relief:

Alachlor, atrazine, bentazon, dicamba, dichlobenil, iprodione, norflurazon, paraquat dichloride, pebulate, simazine, terbacil, thiodicarb, triclopyr TEA.

Although EPA has made a "no effect" determination for the amine formulation of triclopyr, known as triclopyr TEA, it has not yet made any effects determination for the ester formulation of triclopyr, known as triclopyr BEE. To the extent that EPA has in place additional "no effect" determinations for particular Pesticides in particular Salmon ESUs, the injunctive relief set out in this Section is inapplicable to those Pesticides in those Salmon ESUs. The chart attached as Exhibit 1 depicts the Pesticides that have "no effect" determinations in place for particular Salmon ESUs as of the date of this Order.

[6] The Pesticide uses of Salmon ESUs for which EPA has made "not likely to adversely affect" determinations as of the date of this Order are identified in the chart attached as Exhibit 2 to this Order.

and SET ASIDE. This injunction shall not be lifted until this Order is terminated, in whole or in part, as provided in Section VI or by other order of the Court.

1. EPA's authorization of use of 1,3-dichloropropene (telone) products within one yard of Salmon Supporting Waters is ENJOINED, VACATED, and SET ASIDE, when 1,3-dichloropropene products are injected 18" or more beneath the soil and where the soil is mechanically sealed through cultivation following treatment; for other uses, EPA's authorization of any use of 1,3-dichloropropene (telone) within 20 yards of any Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE;

2. EPA's authorization of aerial and ground applications of granular formulations of the Pesticides within 20 yards of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE, except that EPA's authorization of ground use of granular formulations of ethoprop within 20 yards, and aerial applications of granular formulations of ethoprop within 100 yards, of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED and SET ASIDE, because of EPA's concern regarding ethoprop's level of risk and the inability to mitigate that risk effectively;

3. Based on the recommendations in EPA's effects determinations, and the toxicity of phorate to fish, EPA's authorization of phorate use within 40 yards of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE;

4. Based on the recommendations in EPA's effects determinations, EPA's authorization of propargite use within 50 feet, and EPA's authorization of aerial applications of propargite within 75 feet, of Salmon Supporting Waters in

California, Oregon and Washington is ENJOINED, VACATED, and SET ASIDE in all ESUs; except: (a) for mint, seed alfalfa, potatoes, and hops in the Middle Columbia steelhead ESU, in the Palouse watershed of the Snake River fall Chinook ESU, in the Willamette Valley portion of the Upper Willamette steelhead and Upper Willamette Chinook ESUs, and the Oregon portion of the Klamath River watershed in the Southern Oregon/Northern California coast coho ESU, where EPA's authorization of aerial applications of propargite within 100 yards of Salmon Supporting Waters is ENJOINED, VACATED, and SET ASIDE; and (b) for the Upper Columbia Chinook and Upper Columbia steelhead ESUs, where EPA's authorization of any use of application of propargite within 100 yards of Salmon Supporting Waters is ENJOINED, VACATED, and SET ASIDE;

5. EPA's authorization of coumaphos for livestock use within 20 yards of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE, but only for a 24-hour period following application to livestock;

6. EPA's authorization of carbofuran use within 20 yards, and EPA's authorization of any carbofuran aerial application within 100 yards, of any Salmon Supporting Waters in California, Oregon, and Washington, is hereby ENJOINED, VACATED, and SET ASIDE, except that EPA's authorization of carbofuran within one yard of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE, when such products are used on pine seedlings by dipping the seedling roots in a one-percent slurry containing the active ingredients;

7. EPA's authorization of localized spot treatments of the Pesticides using hand-held, ready-to-use devices within one yard of Salmon Supporting Waters in California, Oregon, and

Washington is ENJOINED, VACATED, and SET ASIDE, provided that the area treated is limited to ten percent of the treated right-of-way, roadside, pasture, lawn, or forestry site;

8. EPA's authorization of Pesticide uses in insect bait stations within one yard of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE;

9. EPA's authorization of Pesticide use for spot treatments of wasp and hornet nests within one yard of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE, provided that the area treated is limited to ten percent of the treated right-of-way, roadside, pasture, lawn, or forestry site;

10. EPA's authorization of individual tree removal using cut stump application of the Pesticides within one yard of Salmon Supporting Waters in California, Oregon, and Washington is ENJOINED, VACATED, and SET ASIDE; and

11. EPA's authorization of basal bark application of the Pesticides to individual plants within one yard of Salmon Supporting Waters in California, Oregon and Washington is ENJOINED, VACATED, and SET ASIDE.

C. *Specific Pesticide Product or Use Exclusions*

Based on EPA's effects determinations, the stipulations of Plaintiffs, and the evidence in the record, and notwithstanding Sections III.A. and III.B., the Court determines that EPA's authorization of the following Pesticide uses specified below is not vacated:

1. Based on EPA's effects determinations and the declining use resulting from the 1999 California phase-out, EPA's authorization of metolachlor use in the California

portion of the Southern Oregon/Northern California coast coho ESU;

2. Based on EPA's effects determinations, EPA's authorization of bensulide use for agricultural crops where the maximum label application rate is less than 6 pounds of active ingredient per acre and the label requires banded applications and incorporation into soil;

3. Based on EPA's effects determinations, EPA's authorization of bensulide use on golf course trees and greens, provided bensulide is not used on golf course fairways;

4. EPA's authorization of aerial applications of bensulide;

5. Based on EPA's effects determination, EPA's authorization of phorate use on potatoes;

6. EPA's authorization of aerial applications of phorate;

7. EPA's authorization of aerial applications of 1,3-dichloropropene (telone);

8. EPA's authorization of pest control strips and cattle ear tags containing coumaphos;

9. EPA's authorization of cattle ear tags containing chlorpyrifos;

10. EPA's authorization of indoor uses of any of the Pesticides;

11. EPA's authorization of tree injection applications of the Pesticides;

12. EPA's authorization of homeowner applications of the Pesticides to household potted plants;

13. EPA's authorization of Pesticide use in flea and tick collars for dogs and cats; and

14. EPA's authorization of the Pesticides in manufacturing end-use products.

D. *Particular Pesticide Programs Excluded*

Based on EPA's effects determinations, the stipulation of plaintiffs, or the evidence in the record, and notwithstanding Sections III.A. and III.B., the Court determines that EPA's authorization of the following Pesticide uses specified below is not vacated:

1. Public Health Vector Control Programs

Use of the Pesticides for public health vector control as administered by public entities.

2. Noxious Weed Programs

Use of the Pesticides for control of state-designated noxious weeds as administered by public entities, when such control program implements the following safeguards that NMFS routinely requires for such programs:

a. Aerial application cannot occur within 100 yards of Salmon Supporting Waters;

b. Broadcast spraying cannot occur within 20 yards of Salmon Supporting Waters or when wind speeds are greater than five miles per hour;

c. Chemical spraying cannot occur within 15 feet of Salmon Supporting Waters or when wind speeds are greater than five miles per hour.

d. Only those Pesticides registered by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136(y), for aquatic application can be used within 15 feet of Salmon Supporting Waters;

e. Pesticides cannot be used when precipitation is occurring or is forecast to occur within 24 hours;

f. All spraying operations must be overseen by a certified applicator; and

g. For 2,4-D and triclopyr; only the amine formulations of 2,4-D and triclopyr can be used.

3. NMFS-Authorized Programs

Use of a Pesticide in a specific agency action (other than EPA's authorization of a Pesticide use under FIFRA) as authorized by: (a) a no-jeopardy biological opinion issued by NMFS that addresses the Pesticide's use and effects on a Salmon ESU, and an incidental take statement issued by NMFS under ESA Section 7(a)(2) that authorizes the take of salmon or steelhead listed under the ESA; (b) a written concurrence by NMFS in a "not likely to adversely affect" determination issued under ESA Section 7(a)(2) that addresses the Pesticide's use and effects on a Salmon ESU; (c) an incidental take permit issued by NMFS under ESA Section 10(a) that authorizes the take of salmon or steelhead listed under the ESA for application or use of the Pesticide; or (d) a limit on the take prohibition of ESA Section 9 with respect to a specific use of a Pesticide promulgated by NMFS pursuant to ESA Section 4(d) and incorporated into the salmon 4(d) rule codified at 50 C.F.R. § 223.203.

IV. INJUNCTIVE RELIEF SPECIFIC TO URBAN PESTICIDES

Plaintiffs also seek further injunctive relief with respect to seven active ingredients in urban areas through which Salmon

Supporting Waters pass.[7] The Court finds that for the use of certain pesticides in Urban Areas, buffers alone are an insufficient remedy to ensure that jeopardy to Salmon ESUs and harm to listed salmonids will be avoided. Therefore, in addition to the buffers imposed in Section III, the Court also GRANTS Plaintiffs further injunctive relief for uses of products containing 2,4-D, carbaryl, diazinon, diuron, malathion, triclopyr BEE, and trifluralin (the "Urban Pesticides") in Urban Areas. The Court orders EPA to generate a point of sale notification for the public as described in Section IV.A below, and to facilitate the availability of the notification to the purchaser at the point of sale as described in Section IV.B below.

A. *Mandatory Point of Sale Warning*

EPA must develop a point of sale notification for the Urban Pesticides that incorporates the following written and graphic information:

1. The heading "Salmon Hazard" in a large and visible font followed by the statement that: "This product contains pesticides that may harm salmon or steelhead. Use of this product in urban areas can pollute salmon streams." Both the heading and the statement shall be highly visible to purchasers; and

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[7] "Urban Areas" are defined for purposes of this Order as all urbanized areas in Washington, Oregon, and California with populations of at least 50,000 people, as defined by the 2000 United States Census, within a Salmon ESU. (*See* Urban Area list attached hereto as Exhibit 3.) These areas are defined more precisely in Exhibits 1A, 2A, and 3A to the August 8, 2003 Declaration of Gerald E. Heilman, Jr., which is attached to Plaintiffs' Notice of Filing Concise Definitions and Maps of Urban Watersheds within the Geographic Scope of the Litigation (Aug. 11, 2003).

2. A prominent graphic.

B. *Availability and Distribution of Point of Sale Notifications*

Within 60 days of the effective date of this Order, EPA must notify retailers that they are to make the mandatory point of sale notification set out in Section IV.A whenever products containing the Urban Pesticides are sold in the Urban Areas subject to this Order.

Within 60 days of the effective date of this Order, Intervenor-Defendants will distribute the point of sale notification developed by EPA in quantity, for point of sale distribution, to sale outlets where lawn and garden products are sold in the Urban Areas subject to this Order.

Within 60 days of the effective date of this Order, EPA will produce and provide copies of the point of sale notification to state pesticide agencies, state fish agencies, and land grant university extension coordinators in the Urban Areas subject to this Order and will request that they provide this information to Certified Applicators certified in any category that would permit the applicator to apply pesticides in parks, golf courses, and housing areas in the Urban Areas.

V. EFFECTIVE DATE

This Order shall be effective within two weeks of the date this Order is entered.

VI. TERMINATING EVENTS

The injunctive relief and *vacatur* of EPA's authorizations will terminate automatically for a particular Pesticide and Salmon ESU upon the occurrence of one of the following:

1. Completion by EPA of its ESA Section 7(a)(2) consultation obligation; or

2. The issuance by NMFS of a biological opinion; or

2.[sic] A finding by EPA made for ESA Section 7 compliance purposes that the Pesticide is "not likely to adversely affect" the particular Salmon ESU, provided that the National Marine Fisheries Service has not rejected or affirmatively failed to concur in that "not likely to adversely affect" determination; or

3. A finding by EPA made for ESA Section 7 compliance purposes that the Pesticide will have "no effect" on the particular Salmon ESU.

VII. MODIFICATIONS TO INJUNCTIVE RELIEF

Because of EPA's and NMFS' ongoing actions to comply with ESA Section 7(a)(2), the parties may seek to have this Court modify this injunctive relief. The Court will consider such future requests as it deems appropriate.

VIII. IMPLEMENTATION

EPA is further DIRECTED to inform registrants, states, certified applicators, and licensed pesticide dealers: (1) of this Court's Orders dated July 2, 2002; July 16, 2003; and August 8, 2003; and (2) of this injunction. EPA shall instruct registrants to make aware of this injunction pesticide distributors, wholesalers, retailers, brokers, dealers, and others in privity with them. EPA shall also instruct states to inform registrants, certified applicators, and licensed pesticide dealers of this injunction.

Intervenor-Defendants are DIRECTED to ensure that their members are made aware: (1) of this Court's Orders dated July 2, 2002; July 16, 2003; and August 8, 2003; and (2) of its injunction.

EPA and Intervenor-Defendants shall each file a status report with the Court within 60 days of the date of this Order describing the steps they have taken to comply with this Order.

SO ORDERED this 22nd day of January, 2004.

/s/ John C. Coughenour

CHIEF UNITED STATES
DISTRICT JUDGE

EXHIBIT 1

Pesticides With No Effect Determinations (Shaded) for A Subset of Evolutionary Significant Units

Species	ESU	Azinphos methyl	Bensulide	Captan	Carbaryl	Chlorothalonil	Chlorpyritos	Disulfoton
Steelhead	Southern California							
Steelhead	South-Central California Coast							
Steelhead	Central California Coast			■				
Steelhead	Central Valley, California			■				
Steelhead	Northern California		■	■	■	■		■
Steelhead	Upper Columbia River							
Steelhead	Snake River Basin							
Steelhead	Upper Willamette River							
Steelhead	Lower Columbia River			■				■

Species	ESU	Azinphos methyl	Bensulide	Captan	Carbaryl	Chlorothalonil	Chlorpyritos	Disulfoton
Steelhead	Middle Columbia River							
Chinook Salmon	Sacramento River winter			■				
Chinook Salmon	Snake River fall							
Chinook Salmon	Snake River spring/summer							
Chinook Salmon	Central Valley spring			■				
Chinook Salmon	California Coastal		■	■				■
Chinook Salmon	Puget Sound							
Chinook Salmon	Lower Columbia							■
Chinook Salmon	Upper Willamette							
Chinook Salmon	Upper Columbia							

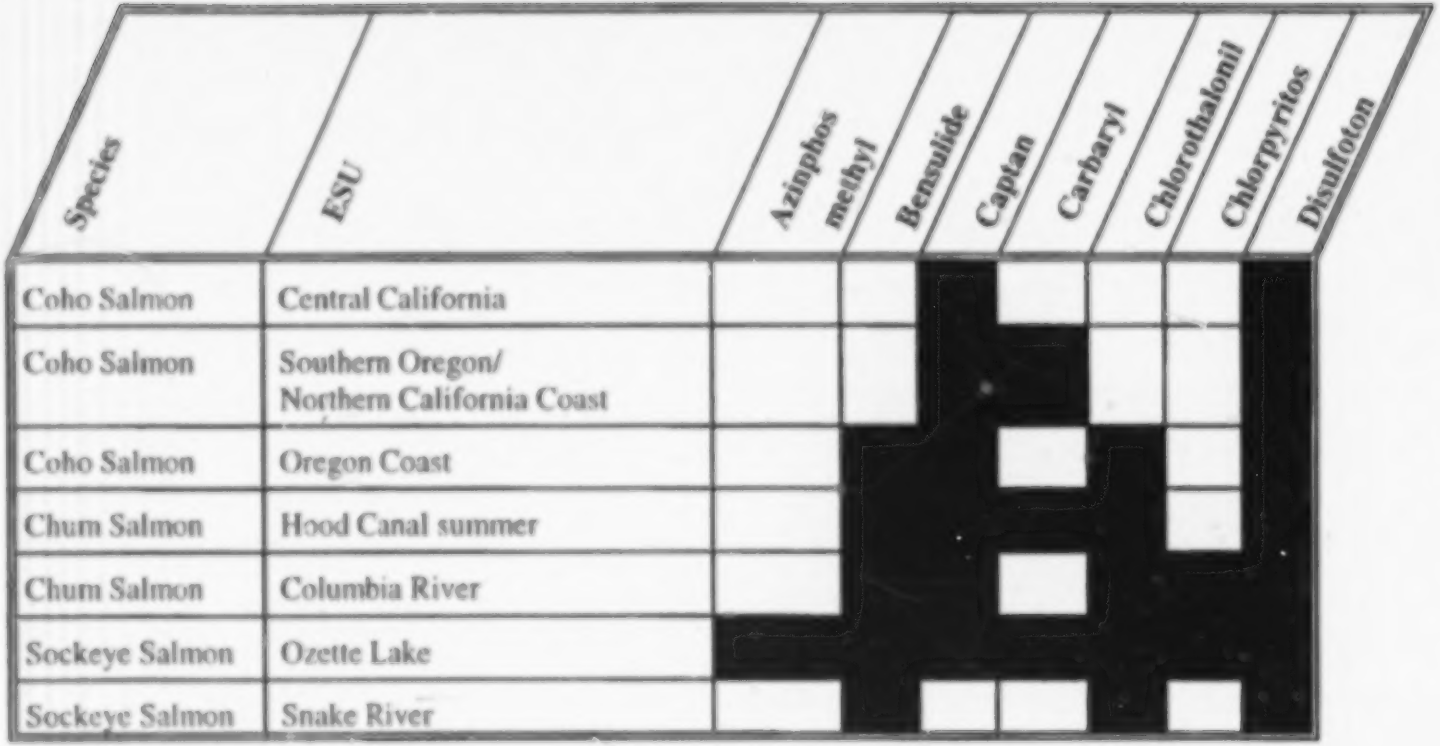
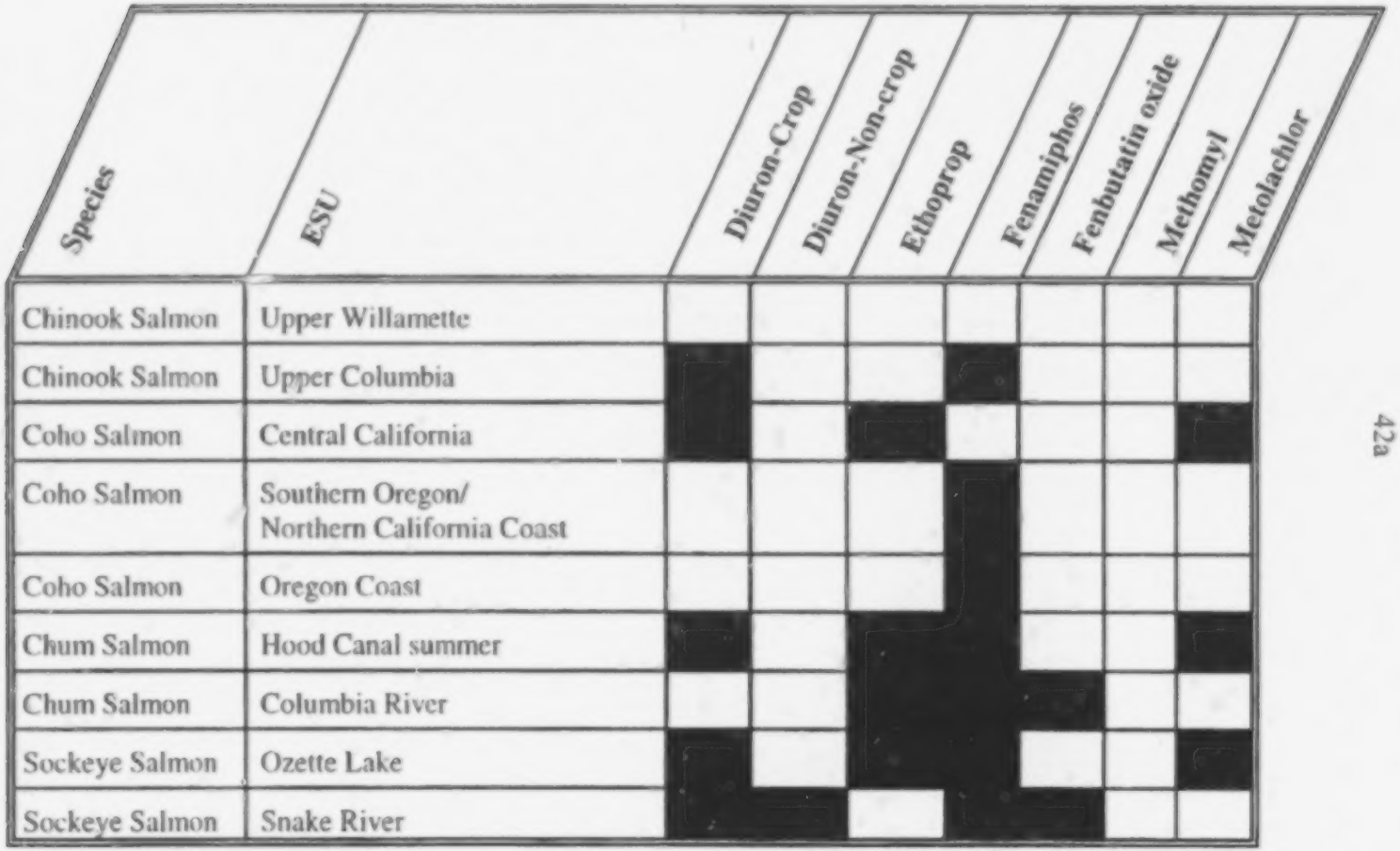

Species
ESU
Azinphos methyl
Bensulide
Captan
Carbaryl
Chlorothalonil
Chlorpyritos
Disulfoton
Coho Salmon
Central California
Coho Salmon
Southern Oregon/ Northern California Coast
Coho Salmon
Oregon Coast
Chum Salmon
Hood Canal summer
Chum Salmon
Columbia River
Sockeye Salmon
Ozette Lake
Sockeye Salmon
Snake River

EXHIBIT 2

Pesticides With No Effect Determinations (Shaded) for A Subset of Evolutionary Significant Units

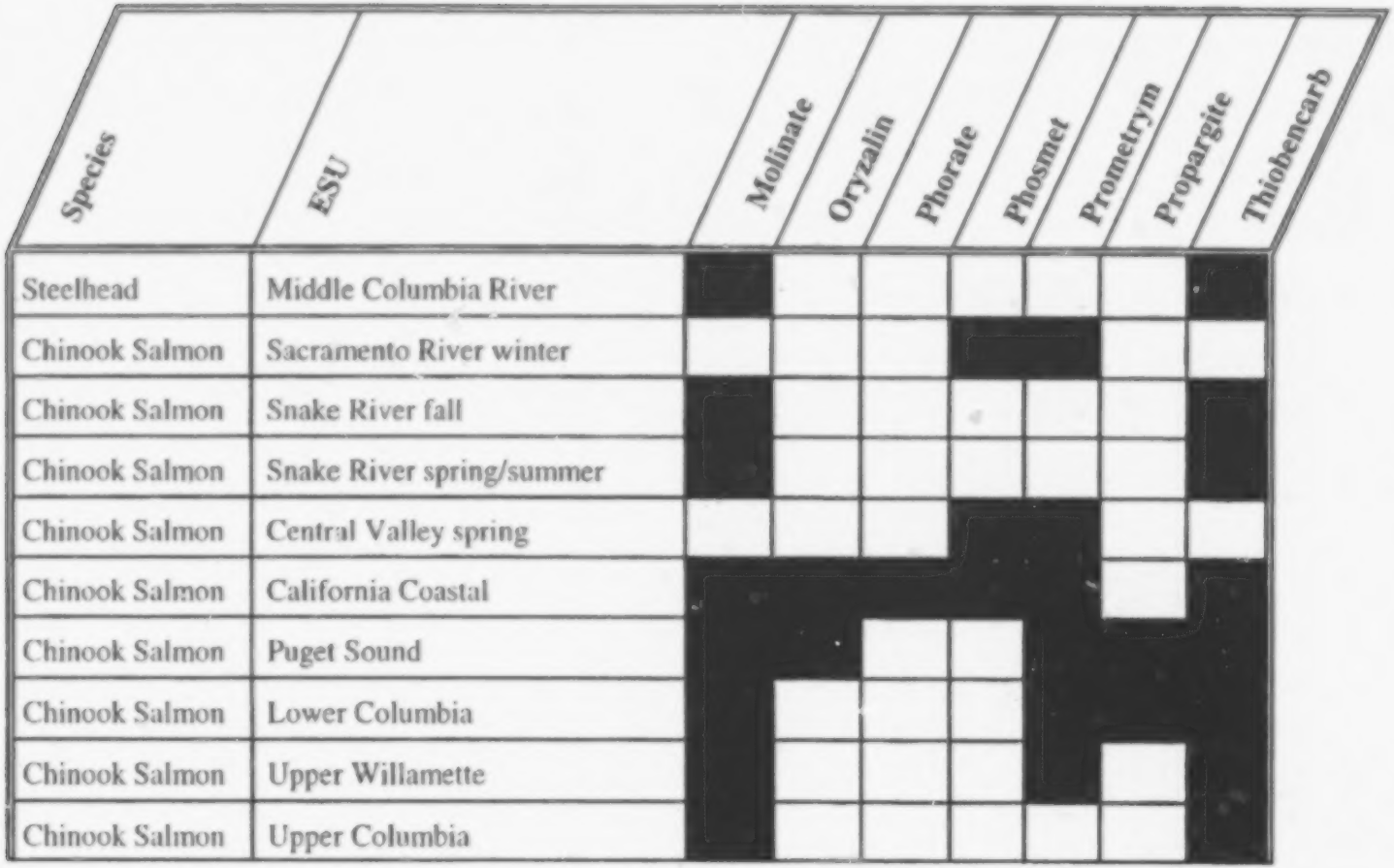
Species	ESU	Diuron-Crop	Diuron-Non-crop	Ethoprop	Fenamiphos	Fenbutatin oxide	Methomyl	Metolachlor
Steelhead	Southern California							
Steelhead	South-Central California Coast							
Steelhead	Central California Coast			■				
Steelhead	Central Valley, California							
Steelhead	Northern California			■	■		■	■
Steelhead	Upper Columbia River	■			■			
Steelhead	Snake River Basin	■			■			
Steelhead	Upper Willamette River							

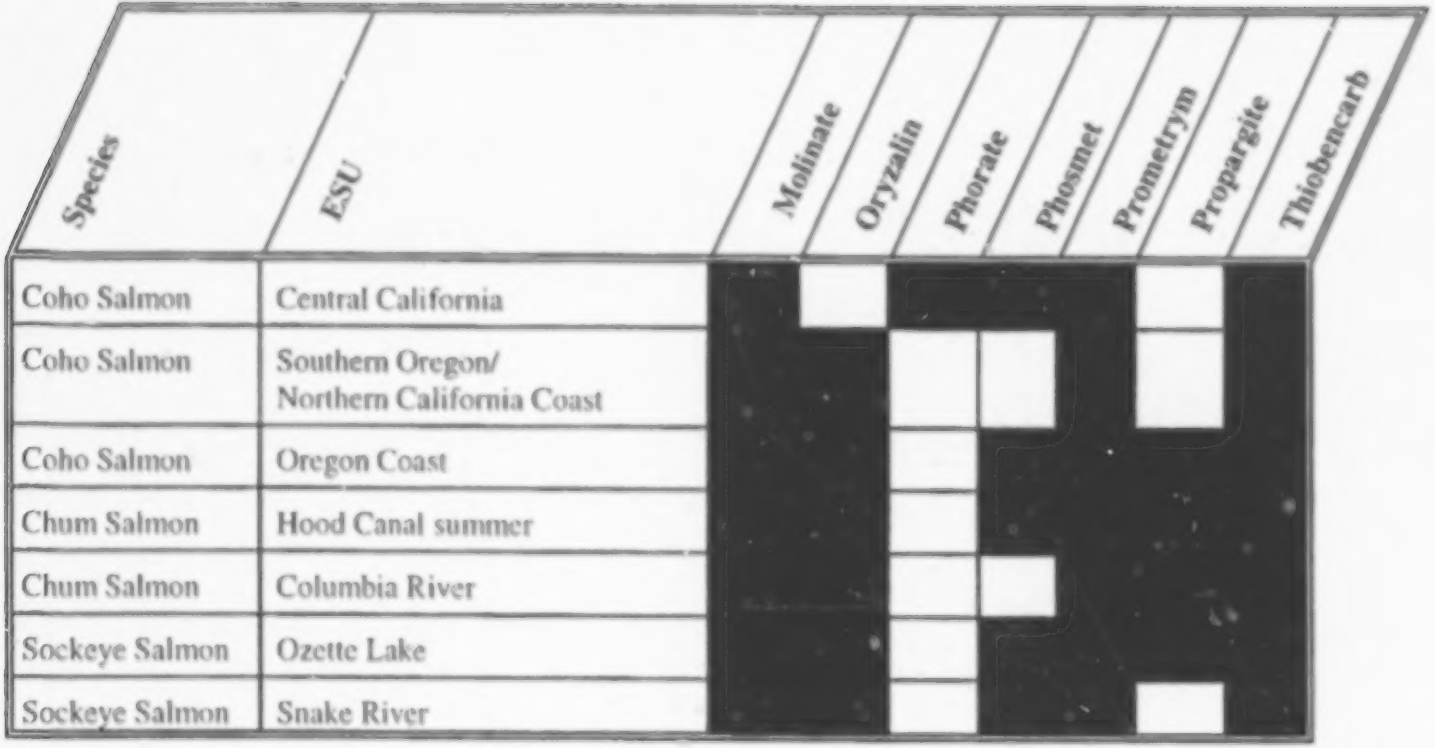
Species	ESU	Diuron-Crop	Diuron-Non-crop	Ethoprop	Fenamiphos	Fenbutatin oxide	Methomyl	Metolachlor
Steelhead	Lower Columbia River							
Steelhead	Middle Columbia River	■			■			
Chinook Salmon	Sacramento River winter			■				■
Chinook Salmon	Snake River fall	■			■			
Chinook Salmon	Snake River spring/summer	■			■			
Chinook Salmon	Central Valley spring							
Chinook Salmon	California Coastal			■	■		■	■
Chinook Salmon	Puget Sound				■			
Chinook Salmon	Lower Columbia							


Species
ESU
Diuron-Crop
Diuron-Non-crop
Elboprop
Fenamiphos
Fenbutatin oxide
Methomyl
Metolachlor
Chinook Salmon
Upper Willamette
Chinook Salmon
Upper Columbia
Coho Salmon
Central California
Coho Salmon
Southern Oregon/
Northern California Coast
Coho Salmon
Oregon Coast
Chum Salmon
Hood Canal summer
Chum Salmon
Columbia River
Sockeye Salmon
Ozette Lake
Sockeye Salmon
Snake River

Pesticides With No Effect Determinations (Shaded) for A Subset of Evolutionary Significant Units

Species	ESU	Molinate	Oryzalin	Phorate	Phosmet	Prometrym	Propargite	Thiobencarb
Steelhead	Southern California	■		■	■			■
Steelhead	South-Central California Coast	■			■			■
Steelhead	Central California Coast	■			■			■
Steelhead	Central Valley, California				■			
Steelhead	Northern California	■	■	■	■			■
Steelhead	Upper Columbia River	■						■
Steelhead	Snake River Basin	■						■
Steelhead	Upper Willamette River	■				■		■
Steelhead	Lower Columbia River	■				■	■	■


Species
ESU
Molinate
Oryzalin
Phorate
Phosmet
Prometrym
Propargite
Thiobencarb
Steelhead
Middle Columbia River
Chinook Salmon
Sacramento River winter
Chinook Salmon
Snake River fall
Chinook Salmon
Snake River spring/summer
Chinook Salmon
Central Valley spring
Chinook Salmon
California Coastal
Chinook Salmon
Puget Sound
Chinook Salmon
Lower Columbia
Chinook Salmon
Upper Willamette
Chinook Salmon
Upper Columbia


Species
ESU
Molinate
Oryzalin
Phorate
Phosmet
Prometrym
Propargite
Thiobencarb
Coho Salmon
Central California
Coho Salmon
Southern Oregon/
Northern California Coast
Coho Salmon
Oregon Coast
Chum Salmon
Hood Canal summer
Chum Salmon
Columbia River
Sockeye Salmon
Ozette Lake
Sockeye Salmon
Snake River

Pesticides With Not Likely to Adversely Affect Determinations for a Subset of Evolutionary Significant Units (shaded)

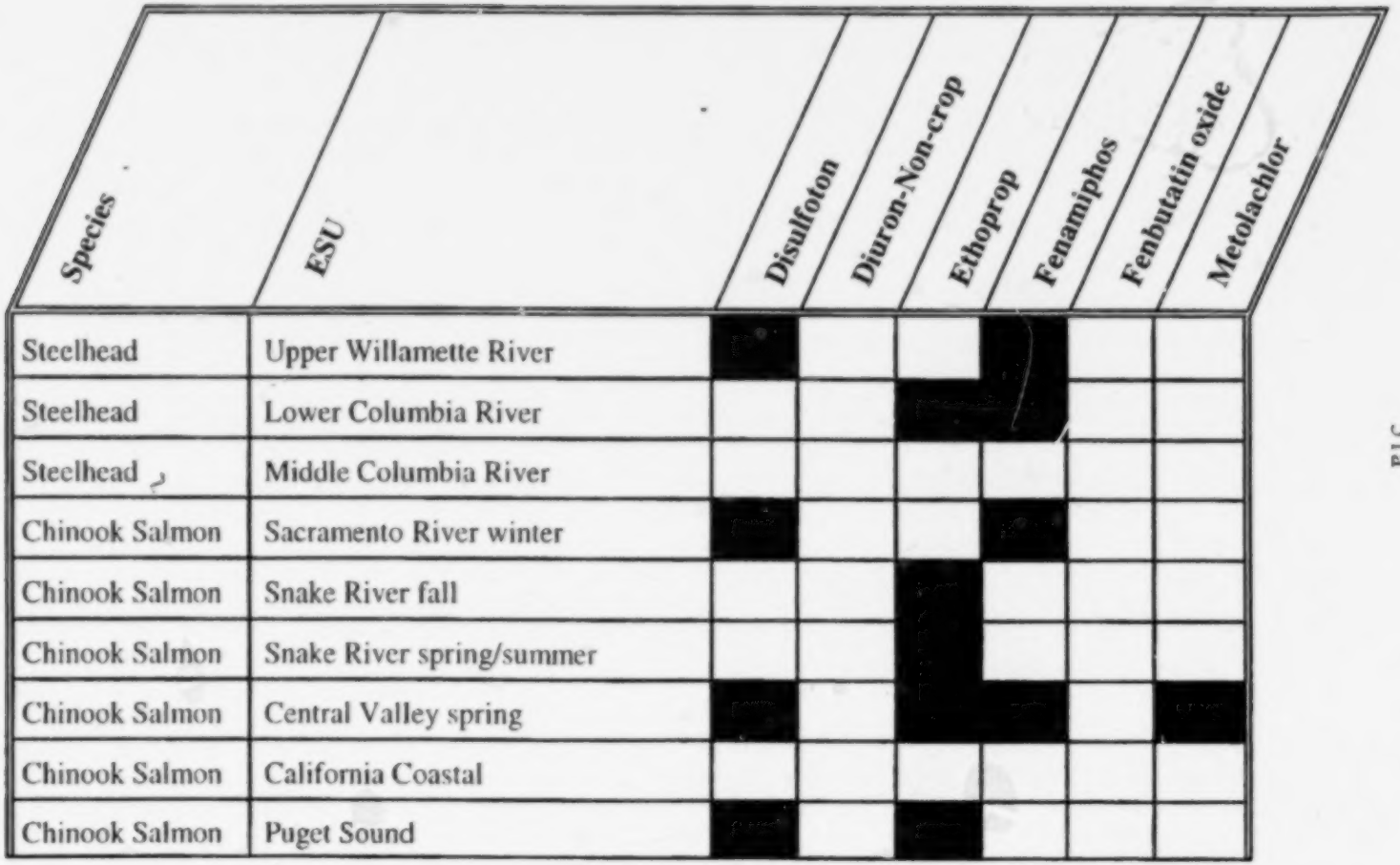
Species	ESU	Bensulide	Captan	Carbaryl	Chlorothalonil	Chlorpyrifos	Diazinon
Steelhead	Southern California		■		■		
Steelhead	South-Central California Coast		■		■		
Steelhead	Central California Coast				■	■	
Steelhead	Central Valley, California				■		
Steelhead	Northern California					■	■
Steelhead	Upper Columbia River		■				
Steelhead	Snake River Basin		■				
Steelhead	Upper Willamette River		■				

Species	ESU	Bensulide	Captan	Carbaryl	Chlorothalonil	Chlorpyrifos	Diazinon
Steelhead	Lower Columbia River				■		
Steelhead	Middle Columbia River		■				
Chinook Salmon	Sacramento River winter	■			■		
Chinook Salmon	Snake River fall		■				
Chinook Salmon	Snake River spring/summer		■				
Chinook Salmon	Central Valley spring				■		
Chinook Salmon	California Coastal			■	■	■	
Chinook Salmon	Puget Sound		■	■			
Chinook Salmon	Lower Columbia		■		■		
Chinook Salmon	Upper Willamette		■				

Species	ESU	Bensulide	Captan	Carbaryl	Chlorothalonil	Chlorpyrifos	Diazinon
Chinook Salmon	Upper Columbia						
Coho Salmon	Central California						
Coho Salmon	Southern Oregon/ Northern California Coast						
Coho Salmon	Oregon Coast						
Chum Salmon	Hood Canal summer						
Chum Salmon	Columbia River						
Sockeye Salmon	Ozette Lake						
Sockeye Salmon	Snake River						

Pesticides With Not Likely to Adversely Affect Determinations for a Subset of Evolutionary Significant Units (shaded)

Species	ESU	Disulfoton	Diuron-Non-crop	Ethoprop	Fenamiphos	Fenbutatin oxide	Metolachlor
Steelhead	Southern California			■	■		■
Steelhead	South-Central California Coast	■		■			■
Steelhead	Central California Coast	■			■		■
Steelhead	Central Valley, California	■		■			■
Steelhead	Northern California						
Steelhead	Upper Columbia River						
Steelhead	Snake River Basin						



Species	ESU	Disulfoton	Diuron-Non-crop	Ethoprop	Fenamiphos	Fenbutatin oxide	Metolachlor
Steelhead	Upper Willamette River	■			■		
Steelhead	Lower Columbia River			■	■		
Steelhead	Middle Columbia River						
Chinook Salmon	Sacramento River winter	■			■		
Chinook Salmon	Snake River fall			■			
Chinook Salmon	Snake River spring/summer			■			
Chinook Salmon	Central Valley spring	■		■	■		■
Chinook Salmon	California Coastal						
Chinook Salmon	Puget Sound	■		■			

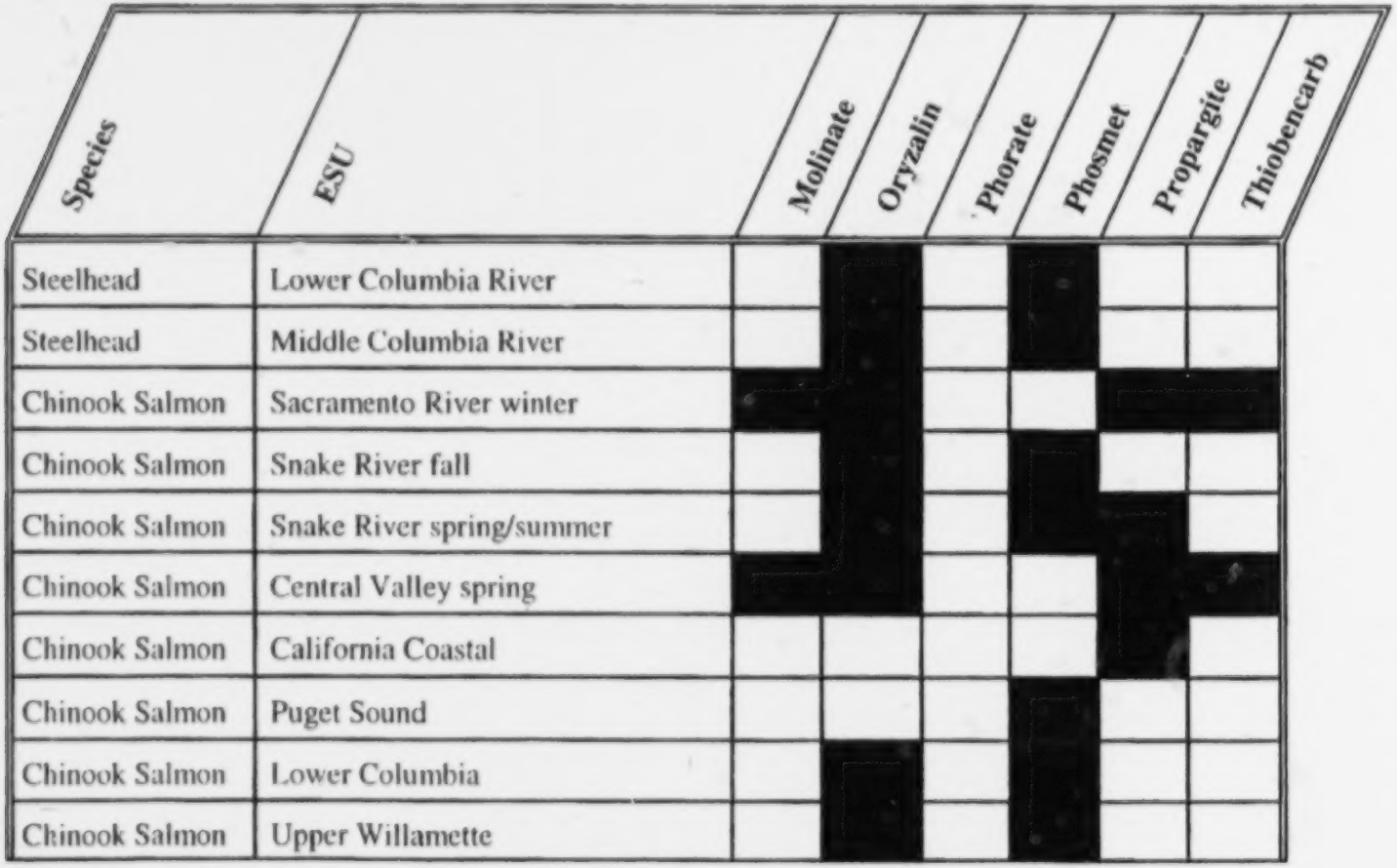
Species	ESU	Disulfoton	Diuron-Non-crop	Ethoprop	Fenamiphos	Fenbutatin oxide	Metolachlor
Chinook Salmon	Lower Columbia			■	■		
Chinook Salmon	Upper Willamette	■			■		
Chinook Salmon	Upper Columbia	■					
Coho Salmon	Central California				■		
Coho Salmon	Southern Oregon/ Northern California Coast			■			
Coho Salmon	Oregon Coast			■			
Chum Salmon	Hood Canal summer						
Chum Salmon	Columbia River						

Species	ESU	Disulfoton	Diuron-Non-crop	Ethoprop	Fenamiphos	Fenbutatin oxide	Metolachlor
Sockeye Salmon	Ozette Lake						
Sockeye Salmon	Snake River						

EXHIBIT 3

Pesticides With Not Likely to Adversely Affect Determinations for a Subset of Evolutionary Significant Units (shaded)

Species	ESU	Molinate	Oryzalin	Phorate	Phosmet	Propargite	Thiobencarb
Steelhead	Southern California		■			■	
Steelhead	South-Central California Coast		■			■	
Steelhead	Central California Coast		■			■	
Steelhead	Central Valley, California	■	■			■	■
Steelhead	Northern California					■	
Steelhead	Upper Columbia River		■		■		
Steelhead	Snake River Basin		■		■	■	
Steelhead	Upper Willamette River		■		■		



Species	ESU	Molinate	Oryzalin	Phorate	Phosmet	Propargite	Thiobencarb
Steelhead	Lower Columbia River		■		■		
Steelhead	Middle Columbia River		■		■		
Chinook Salmon	Sacramento River winter	■	■			■	■
Chinook Salmon	Snake River fall		■		■		
Chinook Salmon	Snake River spring/summer		■		■	■	
Chinook Salmon	Central Valley spring	■	■			■	■
Chinook Salmon	California Coastal					■	
Chinook Salmon	Puget Sound				■		
Chinook Salmon	Lower Columbia		■		■		
Chinook Salmon	Upper Willamette		■		■		

Species	ESU	Molinate	Oryzalin	Phorate	Phosmet	Propargite	Thiobencarb
Chinook Salmon	Upper Columbia		■		■		
Coho Salmon	Central California		■			■	
Coho Salmon	Southern Oregon/ Northern California Coast			■	■		
Coho Salmon	Oregon Coast						
Chum Salmon	Hood Canal summer			■			
Chum Salmon	Columbia River				■		
Sockeye Salmon	Ozette Lake			■			
Sockeye Salmon	Snake River					■	

**US Census Designated Populated Places That Are Within US Census Designated Urban Areas.
The Information For Both Data Sets Are From The 2000 Census. Urban Areas Include Only Those Aeras That Fall Within A Threatened Or Endangered Salmon Or Steelhead ESU.
Populated Places With A Population OF Zero Were Excluded.
A Populated Place Type Of CDP Indicates
A Census Bureau Delineated Non-Incorporated Statistical Area.**

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Antioch	Antioch	City	90,532
CA	Antioch	Bay Point	CDP	21,534
CA	Antioch	Brentwood	City	23,302
CA	Antioch	Oakley	City	25,619
CA	Antioch	Pittsburg	City	56,769
CA	Atascadero—El Paso de Robles (Paso Robles)	Atascadero	City	26,411
CA	Atascadero –El Paso de Robles (Paso Robles)	El Paso de Robles (Paso Robles)	City	24,297
CA	Atascadero—El Paso de Robles	Templeton	CDP	4,687

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
	(Paso Robles)			
CA	Camarillo	Camarillo	City	57,077
CA	Chico	Chico	City	59,954
CA	Concord	Alamo	CDP	15,626
CA	Concord	Blackhawk-Camino Tassajara	CDP	10,048
CA	Concord	Clayton	City	10,762
CA	Concord	Clyde	CDP	694
CA	Concord	Concord	City	121,780
CA	Concord	Danville	Town	41,715
CA	Concord	Diablo	CDP	988
CA	Concord	Dublin	City	29,973
CA	Concord	Lafayette	City	23,908
CA	Concord	Martinez	City	35,866
CA	Concord	Moraga	Town	16,290
CA	Concord	Mountain View	CDP	2,468
CA	Concord	Orinda	City	17,599
CA	Concord	Pacheco	CDO	3,562

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Concord	Pleasant Hill	City	32,837
CA	Concord	Pleasanton	City	63,654
CA	Concord	San Ramon	City	44,722
CA	Concord	Vine Hill	CDP	3,260
CA	Concord	Waldon	CDP	5,133
CA	Concord	Walnut Creek	City	64,296
CA	Fairfield	Fairfield	City	96,178
CA	Fairfield	Suisun City	City	26,118
CA	Gilroy-Morgan Hill	Gilroy	City	41,464
CA	Gilroy-Morgan Hill	Morgan Hill	City	33,556
CA	Gilroy-Morgan Hill	San Martin	CDP	4,230
CA	Livermore	Livermore	City	73,345
CA	Lodi	Galt	City	19,472
CA	Lodi	Lodi	City	56,999
CA	Lodi	North Woodbridge	CDP	1,320
CA	Lodi	South Woodbridge	CDP	2,825
CA	Lompoc	Lompoc	City	41,103
CA	Lompoc	Mission Hills	CDP	3,142

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Lompoc	Vandenberg AFB	CDP	6,151
CA	Lompoc	Vandenberg Village	CDP	5,802
CA	Manteca	Manteca	City	49,258
CA	Modesto	Bret Harte	CDP	5,161
CA	Modesto	Bystrom	CDP	4,518
CA	Modesto	Ceres	City	34,609
CA	Modesto	Del Rio	CDP	1,168
CA	Modesto	Empire	CDP	3,903
CA	Modesto	Hughson	City	3,980
CA	Modesto	Keyes	CDP	4,575
CA	Modesto	Modesto	City	188,856
CA	Modesto	Ripon	City	10,146
CA	Modesto	Riverbank	City	15,826
CA	Modesto	Riverdale Park	CDP	1,094
CA	Modesto	Salida	CDP	12,560
CA	Modesto	Shackelford	CDP	5,170
CA	Modesto	West Modesto	CDP	6,096
CA	Napa	Napa	City	72,585

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Oxnard	Channel Islands Beach	CDP	3,142
CA	Oxnard	El Rio	CDP	5,193
CA	Oxnard	Meiners Oaks	CDP	3,750
CA	Oxnard	Mira Monte	CDP	7,177
CA	Oxnard	Oak View	CDP	4,199
CA	Oxnard	Ojai	City	7,862
CA	Oxnard	Oxnard	City	170,358
CA	Oxnard	Port Hueneme	City	21,845
CA	Oxnard	San Buenaventure (Ventura)	City	100,916
CA	Petaluma	Petaluma	City	54,548
CA	Redding	Anderson	City	9,022
CA	Redding	Redding	City	80,865
CA	Redding	Shasta Lake	City	9,008
CA	Sacramento	Arden-Arcade	CDP	96,025
CA	Sacramento	Carmichael	CDP	49,742
CA	Sacramento	Citrus Heights	City	85,071
CA	Sacramento	Elk Grove	CDP	59,984

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Sacramento	Fair Oaks	CDP	28,008
CA	Sacramento	Florin	CDP	27,653
CA	Sacramento	Foothill Farms	CDP	17,426
CA	Sacramento	Gold River	CDP	8,023
CA	Sacramento	Granite Bay	CDP	19,388
CA	Sacramento	La Riviera	CDP	10,273
CA	Sacramento	Laguna	CDP	34,309
CA	Sacramento	Laguna West-Lakeside	CDP	8,414
CA	Sacramento	Loomis	Town	6,260
CA	Sacramento	North Highlands	CDP	44,187
CA	Sacramento	Orangevale	CDP	26,705
CA	Sacramento	Parkway-South Sacramento	CDP	36,468
CA	Sacramento	Rancho Cordova	CDP	55,060
CA	Sacramento	Rio Linda	CDP	10,466
CA	Sacramento	Rocklin	City	36,330
CA	Sacramento	Rosemont	CDP	22,904
CA	Sacramento	Roseville	City	79,921

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Sacramento	Sacramento	City	407,018
CA	Sacramento	Vineyard	CDP	10,109
CA	Salinas	Boronda	CDP	1,325
CA	Salinas	Castroville	CDP	6,724
CA	Salinas	Prunedale	CDP	16,432
CA	Salinas	Salinas	City	151,060
CA	San Francisco-Oakland	Alameda	City	72,259
CA	San Francisco-Oakland	Albany	City	16,444
CA	San Francisco-Oakland	Ashland	CDP	20,793
CA	San Francisco-Oakland	Atherton	Town	7,194
CA	San Francisco-Oakland	Bayview-Montalvin	CDP	5,004
CA	San Francisco-Oakland	Belmont	City	25,123
CA	San Francisco-Oakland	Berkeley	City	102,743
CA	San Francisco-Oakland	Brisbane	City	3,597
CA	San Francisco-Oakland	Broadmoor	CDP	4,026
CA	San Francisco-Oakland	Burlingame	City	28,158
CA	San Francisco-Oakland	Castro Valley	CDP	57,292
CA	San Francisco-Oakland	Cherryland	CDP	13,837

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	San Francisco-Oakland	Colma	Town	1,191
CA	San Francisco-Oakland	Daly City	City	103,621
CA	San Francisco-Oakland	East Palo Alto	City	29,506
CA	San Francisco-Oakland	East Richmond Heights	CDP	3,357
CA	San Francisco-Oakland	El Carrito	City	23,171
CA	San Francisco-Oakland	El Sobrante	CDP	12,260
CA	San Francisco-Oakland	Emerald Lake Hills	CDP	3,899
CA	San Francisco-Oakland	Emeryville	City	6,882
CA	San Francisco-Oakland	Fairview	CDP	9,470
CA	San Francisco-Oakland	Foster City	City	28,803
CA	San Francisco-Oakland	Fremont	City	203,413
CA	San Francisco-Oakland	Hayward	City	140,030
CA	San Francisco-Oakland	Hercules	City	19,488
CA	San Francisco-Oakland	Highlands-Baywood Park	CDP	4,210
CA	San Francisco-Oakland	Hillsborough	Town	10,825
CA	San Francisco-Oakland	Kensington	CDP	4,936
CA	San Francisco-Oakland	Menlo Park	City	30,685
CA	San Francisco-Oakland	Millbrae	City	20,718

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	San Francisco-Oakland	Newark	City	42,471
CA	San Francisco-Oakland	North Fair Oaks	CDP	15,440
CA	San Francisco-Oakland	Oakland	City	399,484
CA	San Francisco-Oakland	Pacifica	City	38,390
CA	San Francisco-Oakland	Piedmont	City	10,952
CA	San Francisco-Oakland	Pinole	City	19,039
CA	San Francisco-Oakland	Portola Valley	Town	4,462
CA	San Francisco-Oakland	Redwood City	City	75,402
CA	San Francisco-Oakland	Richmond	City	99,216
CA	San Francisco-Oakland	Rodeo	CDP	8,717
CA	San Francisco-Oakland	Rollingwood	CDP	2,900
CA	San Francisco-Oakland	San Bruno	City	40,165
CA	San Francisco-Oakland	San Carlos	City	27,718
CA	San Francisco-Oakland	San Francisco	City	776,733
CA	San Francisco-Oakland	San Leandro	City	79,452
CA	San Francisco-Oakland	San Lorenzo	CDP	21,898
CA	San Francisco-Oakland	San Mateo	City	92,482
CA	San Francisco-Oakland	San Pablo	City	30,215

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	San Francisco-Oakland	South San Francisco	City	60,552
CA	San Francisco-Oakland	Stanford	CDP	13,315
CA	San Francisco-Oakland	Tara Hills	CDP	5,332
CA	San Francisco-Oakland	Union City	City	66,869
CA	San Francisco-Oakland	West Menlo Park	CDP	3,629
CA	San Jose	Alum Rock	CDP	13,479
CA	San Jose	Buena Vista	CDP	1,704
CA	San Jose	Burbank	CDP	5,239
CA	San Jose	Cambrian Park	CDP	3,258
CA	San Jose	Campbell	City	38,138
CA	San Jose	Cupertino	City	50,546
CA	San Jose	East Foothills	CDP	8,133
CA	San Jose	Fruitdale	CDP	895
CA	San Jose	Lexington Hills	CDP	2,454
CA	San Jose	Los Altos	City	27,693
CA	San Jose	Los Altos Hills	Town	7,902
CA	San Jose	Los Gatos	Town	28,592
CA	San Jose	Loyola	CDP	3,478

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	San Jose	Milpitas	City	62,698
CA	San Jose	Monte Sereno	City	3,483
CA	San Jose	Mountain View	City	70,708
CA	San Jose	Palo Alto	City	58,598
CA	San Jose	San Jose	City	894,943
CA	San Jose	Santa Clara	City	102,361
CA	San Jose	Saratoga	City	29,843
CA	San Jose	Seven Trees	CDP	1,666
CA	San Jose	Sunnyvale	City	131,760
CA	San Jose	Sunol-Midtown	CDP	748
CA	San Luis Obispo	San Luis Obispo	City	44,174
CA	San Rafael-Novato	Belvedere	City	2,125
CA	San Rafael-Novato	Black Point-Green Point	CDP	1,143
CA	San Rafael-Novato	Corte Madera	Town	9,100
CA	San Rafael-Novato	Fairfax	Town	7,319
CA	San Rafael-Novato	Kentfield	CDP	6,351
CA	San Rafael-Novato	Larkspur	City	12,014
CA	San Rafael-Novato	Lucas Valley-Marinwood	CDP	6,357

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	San Rafael-Novato	Mill Valley	City	13,600
CA	San Rafael-Novato	Novato	City	47,630
CA	San Rafael-Novato	Ross	Town	2,329
CA	San Rafael-Novato	San Anselmo	Town	12,378
CA	San Rafael-Novato	San Rafael	City	56,063
CA	San Rafael-Novato	Santa Venetia	CDP	4,298
CA	San Rafael-Novato	Sausalito	City	7,330
CA	San Rafael-Novato	Strawberry	CDP	5,302
CA	San Rafael-Novato	Tamalpais-HomesteadValley	CDP	10,691
CA	San Rafael-Novato	Tiburon	Town	8,666
CA	San Rafael-Novato	Woodacre	CDP	1,393
CA	Santa Barbara	Carpinteria	City	14,194
CA	Santa Barbara	Goleta	CDP	55,204
CA	Santa Barbara	Isla Vista	CDP	18,344
CA	Santa Barbara	Mission Canyon	CDP	2,610
CA	Santa Barbara	Montecito	CDP	10,000
CA	Santa Barbara	Santa Barbara	City	92,325

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Santa Barbara	Summerland	CDP	1,545
CA	Santa Barbara	Toro Canyon	CDP	1,697
CA	Santa Clarita	Santa Clarita	City	151,088
CA	Santa Cruz	Aptos	CDP	9,396
CA	Santa Cruz	Ben Lomond	CDP	2,364
CA	Santa Cruz	Capitola	City	10,033
CA	Santa Cruz	Felton	CDP	1,051
CA	Santa Cruz	Live Oak	CDP	16,628
CA	Santa Cruz	Opal Cliffs	CDP	6,458
CA	Santa Cruz	Rio del Mar	CDP	9,198
CA	Santa Cruz	Santa Cruz	City	54,593
CA	Santa Cruz	Scotts Valley	City	11,385
CA	Santa Cruz	Soquel	CDP	5,081
CA	Santa Cruz	Twin Lakes	CDP	5,533
CA	Santa Maria	Nipomo	CDP	12,626
CA	Santa Maria	Orcutt	CDP	28,830
CA	Santa Maria	Santa Maria	City	77,423
CA	Santa Rosa	Cotati	City	6,471

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Santa Rosa	Graton	CDP	1,815
CA	Santa Rosa	Healdsburg	City	10,722
CA	Santa Rosa	Larkfield-Wikiup	CDP	7,479
CA	Santa Rosa	Rohnert Park	City	42,236
CA	Santa Rosa	Roseland	CDP	6,369
CA	Santa Rosa	Santa Rosa	City	147,595
CA	Santa Rosa	Sebastopol	City	7,774
CA	Santa Rosa	Windsor	Town	22,744
CA	Seaside-Monterey-Marina	Carmel Valley Village	CDP	4,700
CA	Seaside-Monterey-Marina	Carmel-by-the-Sea	City	4,081
CA	Seaside-Monterey-Marina	Del Monte Forest	CDP	4,531
CA	Seaside-Monterey-Marina	Del Ray Oaks	City	1,650
CA	Seaside-Monterey-Marina	Marina	City	25,101
CA	Seaside-Monterey-Marina	Pacific Grove	City	15,522
CA	Seaside-Monterey-Marina	Sand City	City	261
CA	Seaside-Monterey-Marina	Seaside	City	31,695
CA	Simi Valley	Simi Valley	City	111,351
CA	Stockton	August	CDP	7,808

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Stockton	Country Club	CDP	9,462
CA	Stockton	French Camp	CDP	4,109
CA	Stockton	Garden Acres	CDP	9,747
CA	Stockton	Kennedy	CDP	3,275
CA	Stockton	Lathrop	City	10,445
CA	Stockton	Lincoln Village	CDP	4,216
CA	Stockton	Morada	CDP	3,726
CA	Stockton	Stockton	City	243,771
CA	Stockton	Taft Mosswood	CDP	1,388
CA	Thousand Oaks	Agoura Hills	City	20,537
CA	Thousand Oaks	Casa Conejo	CDP	3,180
CA	Thousand Oaks	Moorpark	City	31,415
CA	Thousand Oaks	Oak Park	CDP	2,320
CA	Thousand Oaks	Thousand Oaks	City	117,005
CA	Thousand Oaks	Westlake Village	City	8,368
CA	Tracy	Tracy	City	56,929
CA	Turlock	Delhi	CDP	8,022
CA	Turlock	Denair	CDP	3,446

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Turlock	Turlock	City	55,810
CA	Vacaville	Elmira	CDP	205
CA	Vacaville	Vacaville	City	88,625
CA	Vallejo	American Canyon	City	9,774
CA	Vallejo	Benicia	City	26,865
CA	Vallejo	Crockett	CDP	3,194
CA	Vallejo	Vallejo	City	116,760
CA	Watsonville	Amesti	CDP	2,436
CA	Watsonville	Corralitos	CDP	2,431
CA	Watsonville	Freedom	CDP	6,000
CA	Watsonville	Interlaken	CDP	7,328
CA	Watsonville	Las Lomas	CDP	3,078
CA	Watsonville	Pajaro	CDP	3,384
CA	Watsonville	Watsonville	City	44,265
CA	Yuba City	Linda	CDP	13,474
CA	Yuba City	Marysville	City	12,268
CA	Yuba City	Olivehurst	CDP	11,061
CA	Yuba City	South Yuba City	CDP	12,651

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
CA	Yuba City	Sutter	CDP	2,885
CA	Yuba City	Tierra Buena	CDP	4,587
CA	Yuba City	Yuba City	City	36,758
OR	Corvallis	Adair Village	City	536
OR	Corvallis	Corvallis	City	49,322
OR	Corvallis	Philomath	City	3,838
OR	Eugene	Coburg	City	969
OR	Eugene	Eugene	City	137,693
OR	Eugene	Springfield	City	52,864
OR	Longview	Rainier	City	1,687
OR	Medford	Ashland	City	19,522
OR	Medford	Central Point	City	12,493
OR	Medford	Jacksonville	City	2,235
OR	Medford	Medford	City	63,154
OR	Medford	Phoenix	City	4,060
OR	Medford	Talent	City	5,589
OR	Medford	White City	CDP	5,466
OR	Portland	Aloha	CDP	41,741

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
OR	Portland	Beaverton	City	76,129
OR	Portland	Butteville	CDP	293
OR	Portland	Cedar Hills	CDP	8,949
OR	Portland	Cedar Mill	CDP	12,597
OR	Portland	Clackamas	CDP	5,177
OR	Portland	Cornelius	City	9,652
OR	Portland	Durham	City	1,382
OR	Portland	Fairview	City	7,581
OR	Portland	Forest Grove	City	17,708
OR	Portland	Garden Home-Whitford	CDP	6,931
OR	Portland	Gladstone	City	11,438
OR	Portland	Gresham	City	90,205
OR	Portland	Happy Valley	City	4,519
OR	Portand	Hillsboro	City	70,186
OR	Portland	Jennings Lodge	CDP	7,038
OR	Portland	Johnson City	City	634
OR	Portland	King City	City	1,949
OR	Portland	Lake Oswego	City	35,278

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
OR	Portland	Maywood Park	City	777
OR	Portland	Metzger	CDP	3,354
OR	Portland	Milwaukie	City	20,490
OR	Portland	Oak Grove	CDP	12,808
OR	Portland	Oak Hills	CDP	9,050
OR	Portland	Oatfield	CDP	15,750
OR	Portland	Oregon City	City	25,754
OR	Portland	Portland	City	529,121
OR	Portland	Raleigh Hills	CDP	5,865
OR	Portland	Rivergrove	City	324
OR	Portland	Rockcreek	CDP	9,404
OR	Portland	Sherwood	City	11,791
OR	Portland	Sunnyside	CDP	6,791
OR	Portland	Tigard	City	41,223
OR	Portland	Troutdale	City	13,777
OR	Portland	Tualatin	City	22,791
OR	Portland	West Haven-Sylvan	CDP	7,147
OR	Portland	West Linn	City	22,261

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
OR	Portland	West Slope	CDP	6,442
OR	Portland	Wilsonville	City	13,991
OR	Portland	Wood Village	City	2,860
OR	Salem	Eola	CDP	49
OR	Salem	Four Corners	CDP	13,922
OR	Salem	Hayesville	CDP	18,222
OR	Salem	Keizer	City	32,203
OR	Salem	Labish Village	CDP	376
OR	Salem	Salem	City	136,924
OR	Salem	Turner	City	1,199
WA	Bellingham	Bellingham	City	67,171
WA	Bellingham	Geneva	CDP	2,257
WA	Bellingham	Marietta-Alderwood	CDP	3,594
WA	Bellingham	Sudden Valley	CDP	4,165
WA	Bremerton	Bremerton	City	37,259
WA	Bremerton	East Port Orchard	CDP	5,116
WA	Bremerton	Erlands Point-Kitsap Lake	CDP	2,723
WA	Bremerton	Manchester	CDP	4,958

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Bremerton	Navy Yard City	CDP	2,638
WA	Bremerton	Parkwood	CDP	7,213
WA	Bremerton	Port Orchard	City	7,693
WA	Bremerton	Poulsbo	City	6,813
WA	Bremerton	Silverdale	CDP	15,816
WA	Bremerton	Suquamish	CDP	3,510
WA	Bremerton	Tracyton	CDP	3,267
WA	Kennewick-Richland	Burbank	CDP	3,303
WA	Kennewick-Richland	Finley	CDP	5,770
WA	Kennewick-Richland	Highland	CDP	3,388
WA	Kennewick-Richland	Kennewick	City	54,693
WA	Kennewick-Richland	Pasco	City	32,066
WA	Kennewick-Richland	Richland	City	38,708
WA	Kennewick-Richland	West Pasco	CDP	4,629
WA	Longview	Kelso	City	11,895
WA	Longview	Longview	City	34,680
WA	Longview	Longview Heights	CDP	3,513
WA	Longview	West Longview	CDP	2,882

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Longview	West Side Highway	CDP	4,565
WA	Marysville	Arlington	City	11,713
WA	Marysville	Granite Falls	City	2,347
WA	Marysville	Jordan Road-Canyon Creek	CDP	2,326
WA	Marysville	Lake Stevens	City	6,381
WA	Marysville	Lochsloy	CDP	2,135
WA	Marysville	Machias	CDP	1,015
WA	Marysville	Marysville	City	25,315
WA	Marysville	North Marysville	CDP	21,161
WA	Marysville	Northwest Snohomish	CDP	2,061
WA	Marysville	Priest Point	CDP	779
WA	Marysville	Smokey Point	CDP	1,556
WA	Marysville	Snohomish	City	8,494
WA	Marysville	Tulalip Bay	CDP	1,561
WA	Marysville	West Lake Stevens	CDP	18,071
WA	Mount Vernon	Big Lake	CDP	1,153
WA	Mount Vernon	Burlington	City	6,757

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Mount Vernon	Mount Vernon	City	26,232
WA	Mount Vernon	Sedro-Woolley	City	8,658
Wa	Olympia-Lacey	Lacey	City	31,226
WA	Olympia-Lacey	Olympia	City	42,514
WA	Olympia-Lacey	Tanglewilde-Thompson Place	CDP	5,670
WA	Olympia-Lacey	Turnwater	City	12,698
WA	Seattle	Alderwood Manor	CDP	15,329
WA	Seattle	Algona	City	2,460
WA	Seattle	Ames Lake	CDP	1,435
WA	Seattle	Artondale	CDP	8,630
WA	Seattle	Auburn	City	40,314
WA	Seattle	Beaux Arts Village	Town	307
WA	Seattle	Bellevue	City	109,569
WA	Seattle	Black Diamond	City	3,970
WA	Seattle	Bonney lake	City	9,687
WA	Seattle	Bothell	City	30,150
WA	Seattle	Brier	City	6,383

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Seattle	Bryn Mawr-Skyway	CDP	13,977
WA	Seattle	Buckley	City	4,145
WA	Seattle	Burien	City	31,881
WA	Seattle	Cascade-Fairwood	CDP	34,580
WA	Seattle	Cathcart	CDP	3,015
WA	Seattle	Clyde Hill	City	2,890
WA	Seattle	Cottage Lake	CDP	24,330
WA	Seattle	Covington	City	13,783
WA	Seattle	Des Moines	City	29,267
WA	Seattle	DuPont	City	2,452
WA	Seattle	Duvall	City	4,616
WA	Seattle	East Hill-Meridian	CDP	29,308
WA	Seattle	East Renton Highlands	CDP	13,264
WA	Seattle	Eastgate	CDP	4,558
WA	Seattle	Echo Lake	CDP	849
WA	Seattle	Edgewood	City	9,089
WA	Seattle	Edmonds	City	39,515
WA	Seattle	Elk Plain	CDP	15,697

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C01-0132C

WASHINGTON TOXICS COALITION, et al,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY, and CHRISTINE TODD WHITMAN, ADMINISTRATOR,

Defendants,

AMERICAN CROP PROTECTION ASSOCIATION, et al.,

Intervenor-Defendants.

August 8, 2003

ORDER

This matter comes before the Court on plaintiffs' motion for further injunctive relief (Dkt. No. 94). The court has considered the papers submitted by all parties and scheduled oral argument for August 14, 2003 at 9:00 a.m. This order more fully details the reasoning and conclusions outlined by the Court in its July 16, 2003 order (Dkt. No. 151). The Court hereby finds and rules as follows.[1]

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[1] The Court hereby DENIES as moot plaintiffs' motion to strike (Dkt. No. 126). The potential economic impacts proffered by CropLife are not relevant to the issues presently before the Court. *See, e.g., Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 307 F.3d 964, 974 (9th

I. THRESHOLD CHALLENGES TO PLAINTIFFS' MOTION

A *Section 7(a)(2) Provides an Independent Basis for Further Injunctive Relief*

Previously, the Court determined "as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients." The Court ordered EPA "to initiate and complete section 7(a)(2) consultation with NMFS regarding the effects of pesticide-registrations on threatened and endangered salmonids" per a schedule proposed by EPA and endorsed by plaintiffs. EPA's failure to initiate section 7(a)(2) consultation constitutes a substantial procedural violation of the ESA. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).[2]

Generally, the remedy for a substantial procedural violation of section 7(a)(2) must be injunctive relief pending completion of the consultation process. *See Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 307 F.3d 964, 972 (9th Cir. 2020); *Biodiversity Legal Found. v. Badgley*, 284 F.3d 1046, 1057 (9th Cir. 2002); *Thomas*, 753 F.2d at 764. Thus, given EPA's substantial procedural violation of section 7(a)(2), plaintiffs are generally entitled to some form of injunctive relief with respect to EPA's ongoing approval and registration of the 54 pesticide active ingredients pending compliance with section 7(a)(2).

Cir. 2002). The Court has disregarded them accordingly.

[2] An agency's total failure to engage in section 7(a)(2) consultation does not constitute, as CropLife suggests, a *de minimis* violation of the ESA when it is undisputed that an endangered species may be present. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Seattle	Enumclaw	City	11,116
WA	Seattle	Esperance	CDP	3,503
WA	Seattle	Everett	City	91,488
WA	Seattle	Federal Way	City	83,259
WA	Seattle	Fife	City	4,764
WA	Seattle	Fircrest	City	5,868
WA	Seattle	Fort Lewis	CDP	19,089
WA	Seattle	Fox Island	CDP	2,803
WA	Seattle	Frederickson	CDP	5,758
WA	Seattle	Gig Harbor	City	6,465
WA	Seattle	Hunts Point	Town	443
WA	Seattle	Inglewood-Finn Hill	CDP	22,661
WA	Seattle	Issaquah	City	11,212
WA	Seattle	Kenmore	City	18,678
WA	Seattle	Kent	City	79,524
WA	Seattle	Kingsgate	CDP	12,222
WA	Seattle	Kirkland	City	45,054
WA	Seattle	Lake Forest Park	City	13,142

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Seattle	Lake Marcel-Stillwater	CDP	1,381
WA	Seattle	Lake Morton-Berrydale	CDP	9,659
WA	Seattle	Lakeland North	CDP	15,085
WA	Seattle	Lakeland South	CDP	11,436
WA	Seattle	Lakewood	City	58,211
WA	Seattle	Lea Hill	CDP	10,871
WA	Seattle	Lynnwood	City	33,847
WA	Seattle	Maltby	CDP	8,267
WA	Seattle	Maple Valley	City	14,209
WA	Seattle	Martha Lake	CDP	12,633
WA	Seattle	McChord AFB	CDP	4,096
WA	Seattle	Medina	City	3,011
WA	Seattle	Mercer Island	City	22,036
WA	Seattle	Midland	CDP	7,414
WA	Seattle	Mill Creek	City	11,525
WA	Seattle	Milton	City	5,795
WA	Seattle	Mirrormont	CDP	3,804
WA	Seattle	Monroe	City	13,795

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Seattle	Mountlake Terrace	City	20,362
WA	Seattle	Mukilteo	City	18,019
WA	Seattle	Newcastle	City	7,737
WA	Seattle	Normandy Park	City	6,392
WA	Seattle	North Creek	CDP	25,742
WA	Seattle	Orting	City	3,760
WA	Seattle	Pacific	City	5,527
WA	Seattle	Paine Field-Lake Stickney	CDP	24,383
WA	Seattle	Parkland	CDP	24,053
WA	Seattle	Picnic Point-North Lynnwood	CDP	22,953
WA	Seattle	Prairie Ridge	CDP	11,688
WA	Seattle	Puyallup	City	33,011
WA	Seattle	Redmond	City	45,256
WA	Seattle	Renton	City	50,052
WA	Seattle	Riverton-Boulevard Park	CDP	11,188
WA	Seattle	Ruston	Town	738
WA	Seattle	Sammamish	City	34,104

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Seattle	SeaTac	City	25,496
WA	Seattle	Seattle	City	583,374
WA	Seattle	Seattle Hill-Silver Firs	CDP	35,311
WA	Seattle	Shoreline	City	53,025
WA	Seattle	South Hill	CDP	31,623
WA	Seattle	South Prairie	Town	382
WA	Seattle	Spanaway	CDP	21,588
WA	Seattle	Steilacoom	Town	6,049
WA	Seattle	Summit	CDP	8,041
WA	Seattle	Sumner	City	8,504
WA	Seattle	Tacoma	City	193,556
WA	Seattle	Tukwila	City	17,181
WA	Seattle	Union Hill-Novelty Hill	CDP	11,265
WA	Seattle	University Place	City	29,933
WA	Seattle	Waller	CDP	9,200
WA	Seattle	West Lake Sammamish	CDP	5,937
WA	Seattle	White Center	CDP	20,975
WA	Seattle	Woodinville	City	9,194

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Seattle	Woods Creek	CDP	4,502
WA	Seattle	Woodway	City	936
WA	Seattle	Yarrow Point	Town	1,008
WA	Vancouver	Barberton	CDP	4,617
WA	Vancouver	Battle Ground	City	9,296
WA	Vancouver	Camas	City	12,534
WA	Vancouver	Felida	CDP	5,683
WA	Vancouver	Five Corners	CDP	12,207
WA	Vancouver	Hazel Dell North	CDP	9,261
WA	Vancouver	Hazel Dell South	CDP	6,605
WA	Vancouver	Lake Shore	CDP	6,670
WA	Vancouver	Meadow Glade	CDP	2,225
WA	Vancouver	Mill Plain	CDP	7,400
WA	Vancouver	Minnehaha	CDP	7,689
WA	Vancouver	Mount Vista	CDP	5,770
WA	Vancouver	Orchards	CDP	17,852
WA	Vancouver	Salmon Creek	CDP	16,767
WA	Vancouver	Vancouver	City	143,560

State Name	Census Designated Urban Area Name	Populated Place Name	Populated Place Type	Total Population In 2000
WA	Vancouver	Walnut Grove	CDP	7,164
WA	Vancouver	Washougal	City	8,595
WA	Wenatchee	East Wenatchee	City	5,757
WA	Wenatchee	East Wenatchee Bench	CDP	13,658
WA	Wenatchee	Rock Island	City	863
WA	Wenatchee	South Wenatchee	CDP	1,991
WA	Wenatchee	Sunnyslope	CDP	2,521
WA	Wenatchee	Wenatchee	City	27,856
WA	Wenatchee	West Wenatchee	CDP	1,681
WA	Yakima	Ahtanum	CDP	4,181
WA	Yakima	Eschbach	CDP	400
WA	Yakima	Gleed	CDP	2,947
WA	Yakima	Moxee	City	821
WA	Yakima	Selah	City	6,310
WA	Yakima	Summitview	CDP	900
WA	Yakima	Terrace Heights	CDP	6,447
WA	Yakima	West Valley	CDP	10,433
WA	Yakima	Yakima	City	71,845

However, CropLife argues that injunctive relief is not appropriate with respect to ongoing agency actions, such as those at issue here. The Ninth Circuit squarely rejected this argument in *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). There, the district court denied plaintiffs' motion to enjoin ongoing timber, range, and road projects despite the Forest Service's failure to initiate section 7(a)(2) consultation with respect to the projects and the Snake River Chinook salmon. *Id.* at 1056. The projects were outlined in land resource management plans ("LRMPs"), which the Ninth Circuit concluded were ongoing agency actions requiring section 7(a)(2) consultation. *Id.* at 1055-56. The Ninth Circuit held:

> Section 7(a)(2) mandates that the Forest Service enter into consultation [with NMFS] on the LRMPs. Its conclusion that these activities "may affect" the protected salmon is sufficient reason to enjoin these projects. Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected salmon go forward. Accordingly, we reverse the district court's denial of an injunction barring all ongoing and announced activities that may affect the Snake River Chinook from going forward. The Forest Service cannot go forward with these activities without first complying with the consultation requirements of the ESA.

Id. at 1056-57 (footnote omitted).[3]

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[3] The Ninth Circuit noted that under such circumstances section 7(d) was "of no moment." *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994). Here, all parties agree that section 7(d) does not govern plaintiffs' motion for further injunctive relief. The Court shall not further address it.

B. *No Administrative Exhaustion Requirement Bars Plaintiffs' Motion*

EPA and CropLife argue that plaintiffs must first pursue, before requesting interim injunctive relief from this Court, administrative remedies available pursuant to FIFRA with respect to the 54 pesticide active ingredients. That is, EPA and CropLife contend that, although EPA wholly abrogated its mandatory section 7(a)(2) consultation obligations, plaintiffs must initiate a collateral administrative proceeding to request suspension or cancellation of pesticide active ingredients if they wish to protect threatened and endangered salmonids from jeopardy during the consultation process. For numerous reasons, this argument lacks merit.

As discussed above, the ESA provides an independent statutory basis for injunctive relief with respect to ongoing agency actions given a substantial procedural violation of section 7(a)(2). EPA cites no authority to the contrary.[4] In addition, regardless of whether plaintiffs *could* pursue suspension or cancellation proceedings via the APA and FIFRA, this Court held over one year ago that plaintiffs' claims do not arise under the APA and FIFRA. Likewise, plaintiffs' claims are not governed by FIFRA standards.[5] Therefore, the

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[4] EPA argues that exhaustion of administrative remedies is appropriate because it "has not had the opportunity to generate a scientific record examining the merits or lack thereof of plaintiffs' request." However, it is the section 7(a)(2) consultation process that serves to generate this scientific record. Thus, the absence of any record is a result of EPA's own failure to initiate timely consultation with NMFS. EPA's own failure to comply with its legal obligations cannot logically serve as the basis for denying plaintiffs' request for interim injunctive relief.

[5] FIFRA standards would govern any administrative proceeding initiated by plaintiffs pursuant to the APA. However, this action represents plaintiffs' belief that EPA has failed to satisfy ESA standards, not FIFRA standards. Nevertheless, EPA argues that the "imminent hazard" standard of 7 U.S.C.

body of case law cited by EPA is inapposite. EPA cites absolutely no case arising under the ESA in which a court required plaintiffs to initiate a collateral administrative proceeding to seek injunctive relief after concluding that the agency had substantially abrogated its mandatory section 7(a)(2) obligations.

In *Defenders of Wildlife v. Adm'r, Envtl. Protection Agency*, the Eighth Circuit affirmed the district court's conclusion that plaintiffs need not, under the ESA, first exhaust administrative remedies pursuant to FIFRA. 882 F.2d 1294, 1298-1301 (8th Cir. 1989).[6] Defendants argued that plaintiffs effectively sought cancellation of three ongoing strychnine registrations and must proceed under FIFRA. *Id.* Plaintiffs responded that any cancellation would be the "indirect effect" of compelling EPA to fulfill its mandatory ESA obligations with respect to pesticide registrations. *Id.* at 1299. The Eighth Circuit affirmed the district court's order enjoining the strychnine registrations, as then defined, pending EPA's compliance with the ESA. *Id.* at 1301. The court reasoned: "FIFRA does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides. . . .[T]he citizen suit provision permits [plaintiffs] to sue the EPA in an

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§ 136(1) – "unreasonable hazard to the survival of a species declared endangered or threatened" – subsumes the no-jeopardy standard of 50 C.F.R. § 402.02 – "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." The Court disagrees. The plain language of the ESA standard offers more protection to threatened and endangered species that [sic] the FIFRA standard. Further, the mere fact that FIFRA authorizes EPA to suspend registered pesticides during cancellation proceedings in order to protect listed species does not demand that FIFRA remedies trump those independently available under the ESA.

[6] The court also rejected the suggestion that FIFRA provided the exclusive remedy for plaintiffs.

effort to enjoin any asserted violations of the ESA." *Id.* at 1299-1300.

The Ninth Circuit reached a similar conclusion in *Headwaters, Inc. v. Talen Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).[7] There, the Court held that FIFRA subsumes neither NEPA nor Clean Water Act standards. *Id.* at 532 (proper FIFRA registration and labeling does not prevent independent application of Clean Water Act standards to authorized uses). The Court also noted that FIFRA employs a cost-benefit analysis of economic, social, and environmental factors. *Id.* In sharp contrast, the ESA and its substantive standards preclude any such cost-benefit analysis. In sum, the ESA contains no administrative exhaustion requirement.

C. *Court-Ordered Consultation is Not the Sole Remedy Appropriate for Section 7(a)(2) Violations*

Without citation, CropLife argues that this Court's prior order, directing EPA to initiate section 7(a)(2) consultation with respect to 54 pesticide active ingredients, fully remedies any and all violations of the ESA. CropLife suggests that because the Court found no *substantive* violation of the ESA, no substantive relief is necessary to protect threatened and endangered salmonids. However, the Court did find a substantial procedural violation of the ESA. Given this conclusion, interim injunctive relief is necessary to fulfill the substantive, institutionalized caution mandate of the ESA. In an analogous NEPA case, the Ninth Circuit reasoned as follows:[8]

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[7] *See also Merrell v. Thomas*, 807 F.2d 776, 782 n.3 (9th Cir. 1998).

[8] This reasoning is even more forceful in the ESA context because, unlike NEPA, the ESA embodies a specific substantive congressional policy to afford the highest priority to threatened and endangered species. *Southwest Ctr.*, 307 F.3d at 971.

> [T]he point of the environmental review is to determine what measures are needed to protect the environment from harm due to cattle grazing. If grazing is to continue (as the Ranchers insist it should) while the environmental studies necessary to determine the long term protective measures are underway, some 'best estimate' of interim environmental protections is required to remedy the violation. . . .[S]imply ordering completion of the required environmental studies would not provide an adequate remedy because environmental harm from grazing would continue during the six years required (under the district court's expedited timetable) to complete the environmental studies.

Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833 (9th Cir. 2002). For similar reasons, CropLife's argument that the FIFRA regulatory status quo trumps ESA standards with respect to ongoing agency actions is without merit.

II. STANDARDS AND BURDENS FOR INJUNCTIVE RELIEF.

A. *Traditional Standards for Injunctive Relief Do Not Govern*

EPA and CropLife argue that plaintiffs bear the burden to demonstrate "imminent irreparable harm" or "substantial and immediate irreparable injury" with respect to each of the 54 pesticide active ingredients and each ESU of threatened and endangered salmonids.[9] This argument, however, does not comport with twenty-five years of precedent. In the face of a substantial procedural violation of section 7(a)(2), traditional

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[9] CropLife also suggests that plaintiffs cannot satisfy FIFRA's "imminent hazard" standard. However, as discussed above, plaintiffs' request for further injunctive relief is governed by ESA standards, not FIFRA standards.

standards for injunctive relief do not govern. *See, e.g., Tennessee Valley Auth v. Hill*, 437 U.S. 153, 174 (1978); *Sierra Club v. Marsh*, 816 F.2d 1376, 1382-83 (9th Cir. 1997). The language, history, and structure of the ESA demonstrate Congress' determination that the balance of hardships and public interest tips heavily in favor of protected species. *Southwest Ctr.*, 307 F.3d at 971. Irreparable injury is presumed to flow from a substantial procedural violation. *Thomas*, 753 F.2d at 764. These rules fulfill the institutionalized caution mandate of the ESA. *Tennessee Valley Auth.*, 437 U.S. at 194.

Although the majority of cases on which EPA and CropLife rely are irrelevant in the ESA context, two cases demand attention. In *Nat'l Wildlife Fed. v. Burlington N.R.R., Inc.*, plaintiff alleged that Burlington Northern violated the ESA "no-take" provision when its trains spilled corn along Montana tracks and subsequently struck seven endangered grizzly bears. 23 F.3d 1508, 1509-10 (9th Cir. 1994). The Ninth Circuit denied plaintiff's request for an injunction because plaintiff could not demonstrate a reasonable likelihood of future grain spills and subsequent "takes." *Id.* at 1511. However, Burlington Northern had no obligation, as a private entity, to engage in section 7(a)(2) consultation or to ensure that its actions did not jeopardize the continued existence of endangered grizzly bears. Such cases – defining burdens under the ESA "no-take" provision – simply do not apply to violations of section 7 procedural requirements. *Thomas*, 753 F.2d at 765.

Similarly, reliance on *Water Keeper Alliance v. United States Dept. of Defense* is misplaced. 271 F.3d 21 (9th Cir. 2001). There, plaintiffs alleged that the acting agency had an obligation to prepare a biological assessment because its actions constituted a "major construction activity" per statute.

Id. at 24-32.[10] In denying plaintiffs' request for a *preliminary* injunction, the Ninth Circuit reasoned: "We cannot say that Water Keeper has shown a probability [of success on the merits] at this stage that the Navy violated the ESA because it concluded that the interim activities . . . did not constitute a major construction activity necessitating a biological assessment." *Id.* at 33. However, the court specifically noted that the case did not fall within those that "restrict the equity power of the court as to findings of irreparable injury" because plaintiffs could *not* persuasively demonstrate a procedural violation of section 7(a)(2). *Id.* at 34. In sharp contrast, this Court previously ruled on the merits of plaintiffs' section 7(a)(2) claims: EPA's failure to consult with NMFS regarding 54 pesticide active ingredients is a substantial procedural violation of the ESA.

B. *The Narrow Exception*

Moreover, EPA and CropLife misconstrue the "narrow exception" outlined by *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 307 F.3d 964. In *Southwest Ctr.*, plaintiffs sued the Forest Service – the agency administering the relevant grazing and public lands laws – alleging impacts of livestock-grazing on the critical habitat of the threatened loach minnow. *Id.* at 968-70. In response to plaintiffs' lawsuit, the Forest Service reinitiated section 7(a)(2) consultation with respect to the particular grazing allotments at issue. *Id.* at 970. Although plaintiffs prevailed on the merits of their section 7 claims, the district court denied plaintiffs' motion to enjoin all livestock-grazing in areas for which consultation was not yet complete. *Id.* at 970.

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[10] The acting agency had initiated some form of section 7(a)(2) consultation.

On appeal, the Ninth Circuit reviewed the relevant standards for injunctive relief, discussed above. It reasoned: "While courts must generally impose an injunction given a procedural violation of the ESA, this case fits a narrow exception." *Id.* at 973. The Court noted that the case did *not* present a "substantial procedural violation" of the ESA. *Id.*[11] The Ninth Circuit held that agency actions may continue during the section 7(a)(2) consultation process so long as the actions are *non-jeopardizing* to the protected species and will not result in a substantive violation of the ESA. *Id.*[12] The Ninth Circuit's reasoning merits extended quotation:

> [B]oth the present case and *Marsh* are distinguishable from *Thomas* on one important point – in *Thomas* the procedural violation included nothing from which the agency, nor the court, could make any determination of how the action impacted the species or whether the action put the endangered species in jeopardy. In the case at hand, as in *Marsh*, there was evidence in the

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[11] In contrast, EPA's total failure to initiate section 7(a)(2) consultation in the FIFRA context with respect to any threatened or endangered salmonid constitutes a substantial procedural violation.

[12] Pursuant to section 7(a)(2), an agency must insure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (2003). "Jeopardize the continued existence of" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02 (2002). "Adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat critical. 50 C.F.R. § 402.02 (2002).

> record for the court to review the impact of the species during the consultation period. The district court noted that the Forest Service was taking mitigating measures to ensure that the cattle grazing would have little, if any, impact on the loach minnow while formal consultation was taking place. Cattle were excluded from riparian areas, and these areas were being monitored. The consultation was ongoing and was nearing completion. The district court also found that the record supported a finding that the conditions were actually improving given the protective measures that had already been undertaken. These measures do fulfill the purpose of the act as required under *Badgley*, which is to provide protection to endangered and threatened species.

Id. In sum, the Ninth Circuit found that "[t]he record supports the district court's conclusion that the loach minnow is not likely to be harmed during the consultation period." *Id.*

Although the Ninth Circuit did not explicitly address the issue, *Southwest Ctr.* indicates that the acting agency bears the burden to demonstrate that its ongoing actions are *non-jeopardizing*. First, the court held that "non-jeopardizing action may take place," *not* that any action may take place absent a showing of jeopardy. This word choice recognizes the longstanding rule that the benefit of the doubt must go to protected species; the agency, not the species, must bear the risk via institutionalized caution. *See Sierra Club*, 816 F.2d at 1386-89.[13] Second, as the quotation above demonstrates, the Ninth Circuit premised its conclusion on the evidence of no-jeopardy *affirmatively produced* by the Forest Service,

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[13] To hold otherwise would allow an agency to use its failure to initiate section 7(a)(2) consultation as a sword of scientific ignorance to avoid injunctive relief.

including the voluntary imposition of mitigation measures, ongoing monitoring, and evidence of habitat improvement. That is, the Court did not premise its conclusion on the absence of or deficiencies in any evidence submitted by plaintiffs.

Third, the only party capable of demonstrating that the agency's actions are non-jeopardizing is the agency itself.[14] Certainly, *Southwest Ctr.* does not stand for the proposition that no injunctive relief is warranted absent plaintiff's ability to demonstrate that the ongoing agency action is *not* non-jeopardizing. Finally, EPA's and CropLife's interpretation of this "narrow exception" – that, given a substantial procedural violation, plaintiffs nevertheless bear the burden to demonstrate irreparable harm with respect to each pesticide active ingredient and each ESU of threatened and endangered salmon at issue – defined by a case *not* involving a substantial procedural violation, would necessarily overrule repeatedly affirmed Ninth Circuit precedent. *See, e.g., Thomas*, 753 F.2d at 765.[15]

C. *Other Relevant Standards*

Finally, both plaintiffs and EPA reference Judge Zilly's opinion in *Greenpeace v. Nat'l Marine Fisheries Serv.*, 106

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[14] The Court recognizes that it may be appropriate, as in this case, for intervenor-defendants to assist in demonstrating that an agency's actions are non-jeopardizing.

[15] "The Forest Service would require the district court, absent proof by the plaintiffs to the contrary, to make a finding that the Jersey Jack road is not likely to affect the Rocky Mountain Gray Wolf, and that therefore any failure to comply with ESA procedures is harmless. This is not a finding appropriate to the district court at the present time. Congress has assigned to the agencies and to the Fish & Wildlife Service the responsibility for evaluation of the impact of agency actions on endangered species, and has prescribed procedures for such evaluation. Only by following the procedures can proper evaluations be made. It is not responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed."

F.Supp. 2d 1066 (W.D. Wash. 2000). The Ninth Circuit cited *Greenpeace* with approval in *Southwest Ctr.*, 307 F.3d at 972. As an initial matter, it is important to highlight some important distinctions between *Greenpeace* and the instant action. In *Greenpeace*, NMFS had, in fact, consulted pursuant to section 7(a)(2) regarding the impacts of groundfish fisheries on the Steller sea lion. *Id.* at 1069. Thus, Judge Zilly had the benefit of reviewing an administrative record and biological opinions analyzing the fisheries' impacts on Steller sea lion critical habitat. *Id.* at 1076-77. Here, because EPA wholly failed to initiate any consultation with respect to pesticide active ingredients, the Court enjoys the benefit of no such record.

The *Greenpeace* opinion does, however, reflect some ambiguity regarding the appropriate standard for interim injunctive relief. The court first concluded:

> In the present case NMFS's procedural violation directly implicates its duty to insure against jeopardy and adverse modification. By authorizing the yearly fisheries in the absence of an adequate, comprehensive biological opinion, NMFS has failed to "insure" that these fisheries will not likely jeopardize the Steller sea lion or adversely modify its critical habitat. ... NMFS is unable at present to conclude that the overall effects of these numerous fisheries, or its core management scheme, are not likely to adversely affect Steller sea lions. NMFS cannot validly authorize continued fishing within Steller sea lion critical habitat until it meets it substantive obligations under the ESA. Under *Thomas*, an injunction pending compliance must be the remedy.

Id. at 1075-76. Next, the court noted that *even if* plaintiffs bore the burden of proof, injunctive relief was warranted. The court reasoned:

> Based on the Administrative Record, the Court concludes the potential negative effects of the fisheries on the Steller sea lion have been demonstrated with reasonable scientific certainty. Thus, although the actual effects of the fisheries and the efficacy of mitigation measures are uncertain, the significant and demonstrated potential negative effects of these large fisheries constitute a clear threat to appreciably diminish the value of critical habitat for Steller sea lions.

Id. at 1077. Judge Zilly expressly acknowledge the Thomas rule but recognized that injunctive relief need not mechanistically follow from every violation of section 7(a)(2). Consistent with the Ninth Circuit's subsequent opinion in *Southwest Ctr.*, he evaluated the factual record and resolved doubts in favor of the protected species. *Id.* at 1077. Ultimately, Judge Zilly concluded that the parties' expert declarations "raise material issues of fact regarding the potential harm posed by the fisheries" and that "significant, potentially harmful activity is presently on-going in the face of a substantial unremedied procedural violation of the ESA." *Id.* at 1080.[16] Stated another way, the court could not determine that the ongoing fisheries, as defined, were *non-jeopardizing*.

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[16] The court noted that NMFS, by opposing plaintiffs' motion for injunctive relief, was urging the court to make a finding of no-jeopardy when NMFS itself had not reached that conclusion via the formal consultation process. *Id.* at 1078.

III. PLAINTIFFS ARE ENTITLED TO INTERIM INJUNCTIVE RELIEF

A. *EPA and CropLife Fail to Demonstrate that EPA's Ongoing Actions are Non-Jeopardizing*

In light of the legal standards and burdens outlined above, the Court must determine whether interim injunctive relief is warranted to protect threatened and endangered salmonids from EPA's registration of pesticide active ingredients, as presently defined, pending consultation. Given EPA's substantial procedural violation of section 7(a)(2), interim injunctive relief is generally necessary to fulfill the institutionalized caution mandate of the ESA. Further, as discussed below, EPA and CropLife fail to demonstrate the EPA's ongoing actions with respect to pesticide active ingredients are non-jeopardizing to threatened and endangered salmonids.[17] That is, the Court cannot conclude on the factual record before it, that EPA's ongoing actions, as presently defined, will not jeopardize the continued existence of threatened and endangered salmonids and will not lead to the adverse modification of critical habitat.

In contract to the Forest Service in *Southwest Ctr.*, EPA makes no discernable effort to demonstrate no-jeopardy.[18] The bright-line position adopted by EPA in this litigation is

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[17] This *does not* include any ESUs of threatened and endangered salmonids for which EPA has made a corresponding "no-effect" determination with respect to one of the 54 pesticide active ingredients, such as alachlor (all 26 ESUs) or propargite (7 ESUs). Plaintiffs seek no injunctive relief vis-a-vis these specific ESUs and these specific pesticide active ingredients, which are outlined in the declarations of Arthur Jean B. Williams.

[18] Thus, although the Court agrees with CropLife that the pesticide registrations here and grazing allotments in *Southwest Ctr.*, are generally "indistinguishable," EPA's response to plaintiffs' lawsuit and the factual record before the Court are quite distinguishable.

inconsistent with the voluntary efforts to prevent jeopardy demonstrated by the Forest Service in *Southwest Ctr.* and the affirmative evidence of habitat improvement submitted in that case. Further EPA's own "may affect" determinations generally preclude any conclusion of no-jeopardy. *See Pac. Rivers Council*, 30 F.3d at 1056-57. For example, EPA expert Arthur Jean B. Williams describes how pesticide products containing fenbutatin oxide, which is highly toxic to fish, were found to result in the potential for negative effects on 23 of 26 ESUs because the crops for which these products are registered are grown more widely in areas where the pesticide could move into crucial habitat and salmon-bearing waters. Such statements foreclose any conclusion of no-jeopardy.

In addition, EPA's expert declarations do not support the conclusion that EPA's ongoing actions are non-jeopardizing to threatened and endangered salmonids. Dr. Norman Birchfield devotes his declaration to addressing the myriad factors – including each pesticide's peculiar toxicity, chemical properties, application methods, exposure levels, and area weather patterns – relevant to tailoring mitigation measures to avoid pesticide exposure to threatened and endangered salmonids.[19] Dr. Robert Lackey opines:

> Pesticides are one broad class of toxicants that likely have some adverse effect on salmon, but compared to many of the other causes that adversely affect salmon, the effect of pesticides appears to be relatively less important as a cause of the long-term decline on a broad regional scale There may be exceptions in certain locations with relatively high levels of

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[19] The Declaration of Arthur Jean B. Williams also includes a very intelligent discussion of the myriad factors that influence EPA's "no-effect" and "may affect" analyses with respect to particular pesticide active ingredients and particular ESUs.

> pesticides and/or in areas where salmon runs are very low and under severe risk of extinction . . . .

These declarations demonstrate neither a conclusion of, nor confidence in, no-jeopardy.

Next, EPA's current effects determinations further illuminate EPA's inability to demonstrate no-jeopardy with respect to the pesticide active ingredients at issue. For example, for propargite, EPA has requested formal consultation on 7 ESUs and information consultation on 12 ESUs. In a July 23, 2002 letter, Dr. Larry Turner of EPA's Office of Pesticide Programs discusses the underlying analysis: "With the new restricted use classification and the provisions of the California [county] bulletins, especially the [40-yard ground and 200-yard aerial] no-spray buffer, I conclude that propargite [may affect but] is not likely to adversely affect" 9 ESUs in California. Dr. Turner also provides recommendations for Pacific Northwest ESUs:

> [A] 100-yard buffer for aerial applications would prevent jeopardy and most likely avoid any incidental take if applied to mint, seed alfalfa, potatoes, and hops . . . [and] a 100-yard buffer should be applied to all uses of propargite within all counties upstream of the confluence of the Snake River and Columbia River.

Thus, Dr. Turner's opinions explicitly rely upon and recommend the employment of buffer zones; they belie any conclusion of no-jeopardy.[20]

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[20] The expert recommendations of Dr. Turner constitute precisely the exercise of agency expertise to which it is appropriate for the Court to defer. *See generally Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002). The Court intends to craft interim injunctive relief, when possible, specific to particular pesticide active ingredients and particular ESUs when the record reflects the exercise of agency expertise. Therefore,

CropLife and *amicus curiae* do attempt to demonstrate no-jeopardy. They uniformly argue that no buffer zones are necessary to ensure that the pesticide active ingredients at issue do not jeopardize or threaten substantial harm to threatened and endangered salmonids pending consultation. However, the arguments to not comport with the evidence submitted and the standards outlined above. For example, the lindane Reregistration Eligibility Decision notes that "possibly [endangered] fish may be at risk due to the endocrine disrupting properties of lindane" and that EPA will reassess risks to endangered aquatic species with additional data. Likewise, the diflubenzuron Reregistration Eligibility Decision notes: "Endangered species LOCs [levels of concerns] have been exceeded for both acute and chronic effects for freshwater and estuarine/marine aquatic invertebrates. . . . [S]ubstantial amounts of diflubenzuron could be available for runoff to surface waters for several days to weeks post-application." With respect to chlorothalonil, CropLife expert Dr. Jennifer Shaw acknowledges that "the ecological risk assessment prepared by EPA and published . . . in 1999 shows that levels of concern are exceeded for endangered aquatic animals." Although she cites subsequent mitigation measures – 25-foot ground and 150-foot aerial application buffer zones – the measures only apply to "marine/estuarine water bodies," thereby excluding salmonid-bearing lakes, rivers and streams.[21]

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absent persuasive arguments to the contrary, the Court shall, for propargite, adopt the buffer zones recommended and relied upon by Dr. Turner in his analysis. Similarly, to the extent Dr. Turner or another agency expert has exercised agency expertise with respect to other pesticide active ingredients, the Court shall afford such recommendations great weight.

[21] The court notes that current mandatory buffer zones were set without any particular reference to threatened and endangered salmonids and the institutionalized caution mandate of the ESA.

Arguments regarding the necessity of interim buffer zones for atrazine further demonstrate the inability of CropLife and *amicus curiae* to demonstrate no-jeopardy. They argue that current mandatory label restrictions – prohibiting applications of atrazine within 66 feet of streams and rivers and within 200 feet of lakes and reservoirs – are sufficient. However, the April 2002 Reregistration Eligibility Decision explains:

> The potential adverse effects of atrazine on homing and reproduction in endangered salmon and other anadromous fish species is currently uncertain. The laboratory study of olfactory function in mature Atlantic salmon parr and the effect of atrazine . . . for sensing female hormones in urine and behavior to ground salmon skin is notable. This is so especially if the effects are significant on salmon reproduction at such a low atrazine concentration, because existing concentrations in steams inhabited by endangered salmonids may exceed this level for prolonged periods. Atrazine concentrations are likely to be their highest in the later spring and early summer following applications, at a time when salmon are returning from the ocean to spawn. It is unclear . . . whether the effect on olfactory functions is manifested in mature adult salmon and what effect if [sic] might have on reproduction and recruitment. These data are preliminary and additional studies are necessary to determine if there are adverse atrazine effects on adult salmon homing and adult male milt production responses to female hormones in ovulating female urine. Further study is also needed on whether those effects could be significant to reproduction and recruitment.

Further, plaintiffs submit comments by FWS on the Eligibility Decision:

> [S]etting protective levels for pesticides in the environment based on their ability to prevent increased acute lethality is an inadequate level of protections. Certainly, the use of registered pesticides should not result in the deal or non-target organisms, but such use should also not cause other impacts in these organisms, such as altered reproductive capacity. . . . Finally, due to an inability to fully characterize and assess the ecological risks posed by atrazine, it does not appear that EPA will be able to fulfill its legal responsibilities under section 7(a)(2) of the Endangered Species Act to ensure that its proposed reregistration action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. For this reason the Service strongly recommends that prior to attempting to re-register atrazine and entering into a section 7 consultation, that EPA work with the Service to develop sufficient information to adequately evaluate atrazine's effects on listed species.

Plaintiffs submit analogous comments from FWS regarding diazinon.[22]

B. *Plaintiffs Satisfy Any Relevant Burden for Interim Injunctive Relief*

Moreover, plaintiffs satisfy any burden they may have by demonstrating that EPA's ongoing actions, as presently

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[22] The July 2000 comments cite EPA's failure to fully implement reasonable and prudent alternatives and measures (to avoid jeopardy) identified in a 1989 biological opinion and EPA's determination that all registered applications of diazinon exceeded the endangered species level of concern for wildlife, aquatic life, and terrestrial plants in semi-aquatic areas.

defined, present a significant threat of harm and potential negative effects to threatened and endangered salmonids and their critical habitat. *See Greenpeace*, 106 F. Supp. 2d at 1076-80. Plaintiffs submit Reregistration Eligibility Decisions for several pesticide active ingredients that demonstrate these threats.[23] Plaintiffs also direct the Court's attention to several NMFS statements in July 2000 addressing the threats posed by pesticides to salmonids and the fact that current EPA label requirements were developed without adequate information regarding sublethal impacts on salmonids.

Consistent with this concern, a June 2000 letter from FWS notes that EPA had not implemented mandatory use restrictions outlined in a 1989 biological opinion. The letter continues:

> Unless EPA requires mandatory compliance with FIFRA-enforceable pesticide use limitations, there will be no certainty that our consultations on pesticides will result in protective measures for threatened and endangered species. Unless the pesticide applicatory is required to implement the use limitations necessary to protect listed species, we cannot assume that the alternatives to avoid jeopardy or the measures to minimize take will be effective

In addition, a September 2002 biological opinion issued by NMFS, pertaining to noxious weed control in national forests, illustrates the significant sublethal threats posed by pesticides

> First, there is little data that documents the effects of the proposed herbicide products on ecosystems and the specific invertebrate prey of listed aquatic

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[23] These include atrazine, azinphos-methyl, carbaryl, chlorpyrifos, diazinon, disulfoton, ethoprop, malathion, methamidophos, methidathion, metribuzin, oxyfluoren, phorate, phosmet, propargite, trifluralin, and fenbutatin-oxide.

> ecosystems and the specific invertebrate prey of listed salmonids. Second, the scientific studies that have been conducted on fish are largely limited to measures of acute mortality *i.e.*, the concentrations at which short-term exposures to a pesticide will kill fish outright (LC50subscript) [sic]. In many cases, acute mortality data may not be appropriate for estimating whether a pesticide will have adverse, non-lethal effects on the essential behavior patterns of salmonids (*e.g.*, feeding, spawning, or migration). . . . Sub-lethal effects of chemicals and pesticides do play a significant role in reducing the fitness of natural salmonid populations.
>
> Most direct effects of herbicides on listed salmon and steelhead are likely to be from sublethal effects, rather than outright mortality from herbicide exposure.
>
> The lethality endpoint has little predictive value for assessing whether real world pesticide exposure will cause sublethal neurological and behavioral disorders in wild salmon.
>
> Although lethal effects are not expected to occur under most circumstances, listed fish are likely to be exposed to herbicide concentrations where sublethal effects could occur. Potential sublethal effects, such as those leading to a shortened lifespan, reduced reproductive output, other types of "ecological death" or other deleterious biological outcomes is a threat to listed species from the proposed action.

In sum, the expert declarations raise material issues of fact with respect to the substantial potential harm posed by EPA's ongoing actions, as presently defined. That is, significant, potentially harmful activity is presently ongoing in the face of a substantial unremedied procedural violation of the ESA.

IV. PLAINTIFFS' REQUESTED BUFFER ZONES WILL PREVENT JEOPARDY

The evidence submitted – including the declarations of *all* parties' experts, reregistration eligibility decisions, EPA risk assessments, prior EPA consultations with the Fish and Wildlife Service, EPA's reliance on California's county bulletin buffer zones, and an EPA expert's current section 7(a)(2) recommendations – demonstrates that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids. Plaintiffs' experts sufficiently articulate the general efficacy of buffer zones in preventing the migration of pesticides, via spray drift, surface runoff, or erosion, into salmonid-bearing waters.[24] Neither EPA nor CropLife dispute these basic principles.

EPA expert Dr. Normal Birchfield opines that, although other mitigation measures may be equally or more effective based on peculiar pesticide characteristics and application methods, buffer zones are a "simple and relatively effective option in instances where spray drift is a major route of off-target movement." As discussed above with respect to propargite, current EPA effects determinations and expert recommendations hinge on the employment of buffer zones, such as those outlined by California county bulletins, to prevent jeopardy to threatened and endangered salmonids.[25] Similarly,

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[24] For example, in the Yakima River Basin the highest frequency and concentrations of pesticides occur in irrigation season as a result of excess irrigation water runoff.

[25] According to a 1985 draft submitted by plaintiffs, the California bulletins provide "a form of supplemental pesticide labeling for certain pesticides that specifies additional use limitations for protection of endangered species." The State of California premised these county-bulletin buffer zones on strategies to avoid jeopardy outlined in existing biological

EPA expert Dr. Turner recommends: "We propose that if [EPA] adopts a no-spray buffer and vegetative filter strip between sites where oryzalin may be used and sites where salmon and steelhead occur, jeopardy would be avoided and take would likely be eliminated.[26] Likewise, CropLife acknowledges the efficacy of buffer zones imposed by the most recent Reregistration Eligibility Decisions for several pesticides.[27] For example, CropLife trumpets the 21% aerial and 96% ground spray-drift reductions resulting from existing 150-foot aerial and 25-foot ground diflubenzuron buffer zones.

Further, the above-referenced 1989 FWS biological opinion strongly supports the efficacy of buffer zones to prevent jeopardy. This biological opinion concluded EPA's formal consultation regarding the impacts of pesticides on listed aquatic specifies from certain crop uses, forestry uses, and rangeland uses. In every instance that the opinion found jeopardy to an aquatic species from a pesticide at issue in this case, such as diazinon and diflubenzuron, the opinion employed buffer zones as a reasonable and prudent alternative to avoid jeopardy. These buffer zones, like those requested by plaintiffs here, were two-tiered for ground and aerial applications.

Moreover, plaintiffs demonstrate, with reasonable scientific certainty, that the requested buffer zones[28] – 20 yards

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opinions. Also, the State of Washington Department of Natural Resources recommends a 200-foot vegetated riparian buffer in agricultural lands to slow runoff and filter pesticides.

[26] Dr. Turner makes a similar recommendation for chlorpyrifos.

[27] The Court notes, however, that these buffer zones did not purport to bring the registrations in line with the substantive standards of the ESA.

[28] The EPA defines a "buffer zone" or "no-spray zone" as "an area in which direct application of the pesticide is prohibited; this area is a specified distance between the closest point of direct pesticide application and the nearest boundary of a site to be protected, unless otherwise specified . . . ."

for ground applications, 100 yards for aerial applications – will, unlike the status quo, substantially contribute to the prevention of jeopardy. For example, plaintiffs' expert Dr. Ken Giles recognizes the long-term solutions should be "tailored to particular pesticide applications" but concludes that "spray drift buffers offer an easily workable and effective mitigation." He opines that the "100yd (92m) and 20yd (18.5m) buffer zones for aerial and ground applications, respectively, should reduce deposition caused by fallout drift by 99% or more as compared to intentional deposition in the normally-sprayed field boundary." Also, plaintiffs' expert Dr. David Zaber analyzes various EPA sources that specify safeguards to prevent adverse effects on threatened and endangered species. He concludes that a substantial number of such safeguards employ no-spray buffer zones of 20 yards and 100 yards, respectively, for ground and aerial applications. Finally, the Court notes that the 20-yard and 100-yard buffer zones requested by plaintiffs are generally consistent with those recommended by EPA.

V. A FULL-BLOWN EVIDENTIARY HEARING IS NOT APPROPRIATE

In its opposition, EPA requests that the Court hold an evidentiary hearing to ascertain appropriate injunctive relief *if* it determines that such relief is warranted. That is, EPA seeks to bifurcate the threshold legal arguments upon which it principally relies from factual arguments it may raise regarding specific relief. The Court denies EPA's request. Plaintiffs filed the instant motion on November 26, 2002. Following a period of expert discovery, EPA and CropLife respectively filed thirty-five page opposition briefs approximately four months later. EPA made no timely request to bifurcate the relevant legal and factual issues, both of which plaintiffs fully presented. The Court finds that EPA had sufficient time to prepare both legal and factual arguments.

Indeed, EPA submits extensive expert declarations, generally directed to discrediting the uniform buffer zones requested by plaintiffs. However, as evidenced above, these declarations simply do not address the essential question: What interim injunctive measures, if any, are necessary to avoid jeopardy (and adverse modification of critical habitat) to threatened and endangered salmonids pending consultation with NMFS with respect to each pesticide active ingredient?[29] Rather, the expert declarations appear premised on EPA's erroneous legal conclusions: 1) that plaintiffs must affirmatively demonstrate irreparable harm with respect to each pesticide active ingredient and each ESU of threatened and endangered salmonids; and 2) that plaintiffs must affirmatively demonstrate that the requested buffer zones will prevent jeopardy given each pesticide active ingredient's peculiar properties and application methods.[30]

Further, relevant case law does not support EPA's request for a full-blown evidentiary hearing. It is the responsibility of

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[29] It is difficult for the Court to do what Judge Winmill did in *Idaho Watersheds Project*. 307 F.3d 815. There, in the NEPA context, faced with plaintiffs' request to enjoin all livestock-grazing and intervenor-defendants' opposite request to permit all grazing, the court requested recommendations from the BLM, the defendant agency. *Id.* at 823. The BLM itself proposed the terms of the interim protective measures – livestock-grazing buffer zones – and the district court deferred to the agency's substantial expertise. *Id.* at 831. The Ninth Circuit approved this process. *Id.* Here, however, EPA has placed the Court in a difficult position by adopting a generally absolutist legal position.

[30] Neither plaintiffs nor the Court dispute EPA's contention that, ultimately, buffer zones (or any other steps to prevent jeopardy) should not be generic but should be specifically tailored to each pesticide active ingredient and each ESU of threatened and endangered salmonids. However, it is the burden of EPA and NFMS, not plaintiffs, to do so. The absence of complete consultation does not grant EPA the license to do nothing in the interim.

neither plaintiffs nor the Court to determine the precise effects of EPA-registered pesticide active ingredients on threatened and endangered salmonids. Rather, EPA and NFMS [sic] shall make these determinations via the fact-intensive inquiry of the section 7(a)(2) consultation process. *See Thomas*, 753 F.2d at 765; *see also Idaho Watersheds Project*, 307 F.3d at 831-33.[31] Only this process itself can determine the long-term measures necessary to prevent jeopardy, adverse impacts, or irreparable harm to threatened and endangered salmonids. *See Thomas*, 753 F.2d at 763.

However, because EPA failed to either propose interim mitigation measures itself or make counter-recommendations with respect to plaintiffs' requested buffer zones, the Court will entertain limited argument regarding those buffer zones.[32] That is, EPA and CropLife may present arguments with respect to *the specific size* of the ground and aerial buffer zones requested by plaintiffs. These arguments shall be specific to particular pesticide active ingredients and particular ESUs of threatened and endangered salmonids. Where an EPA expert has already recommended specific buffer zones or relied upon existing voluntary buffer zones in the course of section 7(a)(2)

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[31] "It would be odd to require the district court to conduct an extensive inquiry, which would by nature involve scientific determinations, in order to support interim measures that are designed to temporarily protect the environment while the BLM conducts studies in order to make the very same scientific determinations. . . . Because these are interim measures designed to allow for a process to take place which will determine permanent measures, and all parties will have adequate opportunity to participate in the determination of permanent measures (and if need be challenge the outcome in court), we hold that an evidentiary hearing was not required on the facts of this case." *Idaho Watersheds Project*, 307 F.3d at 831.

[32] As discussed above, plaintiffs have satisfied their burden to demonstrate the efficacy of buffer zones to prevent jeopardy pending completion of section 7(a)(2) consultation.

consultation – such as Dr. Turner with respect to propargite – the Court shall likely adopt those buffer zones as appropriate interim injunctive relief.[33] Absent an EPA "no-effect" determination or stipulation from plaintiffs, the Court shall not entertain arguments that *no* buffer zones are appropriate. In addition, the Court will entertain arguments regarding the additional urban-use restrictions requested for 13 pesticide active ingredients.[34]

Finally, the Court reiterates that, at oral argument, it would welcome any voluntary input or recommendations regarding the requested buffer zones and urban-use restrictions from NMFS, the agency ultimately responsible for the protection of salmonids. *See generally* 50 C.F.R. §§ 402.13(b),. 14(g)-(h) (2002). NMFS's participation is contingent on its cooperation with all parties. That is NMFS shall not participate as a witness for any particular party, but may act akin to an informal Court-appointed expert. Even following oral argument and the imposition of interim injunctive relief, the Court shall consider any jeopardy-prevention recommendations from NMFS that may warrant the modification of such relief prior to an EPA "no-effect" determination, NMFS written concurrence, or biological opinion.

VI. CONCLUSION

It is important to note the precise nature of the interim injunctive relief to be ordered by the Court. Plaintiffs do not challenge any pesticide registrant's FIFRA registrations; plaintiffs "merely seek[] to enforce the public right to

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[33] Although Dr. Turner also recommended buffer zones for oryzalin and chlorpyrifos, he did not specify the specific sizes of these buffer zones.

[34] At oral argument, plaintiffs should provide the Court clear and concise definitions and maps of all urban watersheds within the geographic scope of this litigation.

administrative compliance with the environmental protection standards of . . . the ESA." *Conner v. Buford*, 848 F.2d 1441, 1460 (9th Cir. 1988); *see also Defenders of Wildlife*, 882 F.2d at 1298-99. Thus, in granting relief, the Court will be setting aside ongoing EPA actions with respect to particular pesticide active ingredients to the extent those actions authorize ground and aerial applications of such ingredients within specific distances of threatened and endangered salmonid-bearing waters. *See Conner*, 848 F.2d at 1460-61. The Court is not ordering EPA to take action. Rather, it is setting aside a limited class of agency actions – for the explicit purpose of preventing jeopardy and ensuring compliance with the ESA – due to EPA's failure to comply with section 7(a)(2).[35] The Court is cognizant of the practical implications of this ruling. However, the Court is not, as suggested by EPA and CropLife, suspending the FIFRA registrations of pesticide active ingredients.[36] *See Defenders of Wildlife*, 882 F.2d at 1299-1301.

Accordingly, the Court hereby GRANTS plaintiffs' motion for further injunctive relief, to the extent outlined by this order. Following oral argument, the Court shall issue an order defining the specific size of ground and aerial buffer zones with respect to each pesticide active ingredient and each ESU of

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[35] *See Southwest Ctr.*, 307 F.3d at 971-72 (citations omitted) (court must determine whether injunction necessary to effectuate congressional purpose behind statute).

[36] In reply, plaintiffs note that EPA possesses regulatory authority – for example, via Pesticide Regulation ("PR") Notices – to alter pesticide uses without actually canceling or suspending FIFRA pesticide registrations. CropLife confirms this authority and the various regulatory avenues available.

threatened and endangered salmonids.[37] This order shall also address plaintiffs' request for additional urban-use restrictions with respect to 13 pesticide active ingredients. The Court's temporary injunction shall last only so long as it takes EPA to fulfill its section 7(a)(2) consultation obligations. That is, any interim injunctive relief imposed by the Court shall terminate upon an EPA "no-effect" determination,[38] a NFMS written concurrence following informal consultation,[39] or the issuance of a NMFS biological opinion.[40] Finally, as previously stated, the Court shall consider any interim jeopardy-prevention recommendations from NMFS that may warrant the modification or termination of such relief.

SO ORDERED this 8th day of August, 2003.

/s/ John C. Coughenour

CHIEF UNITED STATES
DISTRICT JUDGE

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[37] The Court requests that plaintiffs submit at oral argument a chart outlining, on a per pesticide active ingredient and per ESU basis, any specific buffer zones recommended by Dr. Turner or other EPA expert, including existing buffer zones or state programs on which EPA effects determinations may rely. *See supra* note 20.

[38] The Court requests that the parties submit at oral argument an updated list of all pesticide active ingredients and ESUs for which EPA has made a corresponding "no-effect" determination.

[39] *See* 50 C.F.R. §402.13(a) (2002).

[40] The five alternative "shifting statuses" proposed by CropLife are unwarranted.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C01-0132C

WASHINGTON TOXICS COALITION, et al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY, and CHRISTINE TODD WHITMAN, ADMINISTRATOR,

Defendants,

v.

AMERICAN CROP PROTECTION ASSOCIATION, et al.,

Intervenor-Defendants.

July 16, 2003

ORDER

This matter comes before the Court on plaintiffs' motion for further injunctive relief (Dkt. No. 94). The Court has considered the papers submitted by all parties and scheduled oral argument for August 14, 2003. To assist the parties in preparations for oral argument, this brief order 1) summarizes the Court's conclusions with respect to the various legal issues raised by the parties in connection with plaintiffs' motion, and 2) defines the issues to be addressed at oral argument. The Court intends to follow this brief order with an order more fully detailing the Court's reasoning and conclusions.

Previously, the Court determined "as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients."[1] Given this substantial procedural violation of section 7(a)(2), plaintiffs are entitled to injunctive relief with respect to the 54 ongoing agency actions pending EPA's compliance with section 7(a)(2). *See Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 307 F.3d 964, 972 (9th Cir. 2002); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).[2] Traditional standards for injunctive relief do not govern under these circumstances. *See, e.g., Sierra Club v. Marsh*, 816 F.2d 1376, 1382-83 (9th Cir. 1997). However, agency actions may continue during the section 7(a)(2) consultation process so long as the actions are *non-jeopardizing* to the protected species and will not result in a substantive violation of the ESA. *See Southwest Ctr.*, 307 F.3d at 973; *see also* 16 U.S.C. § 1536(a)(2) (2003); 50 C.F.R. § 402.02 (2002) (defining "jeopardize the continued existence of" and "adverse modification"). To invoke this "narrow exception," *the acting agency bears the burden* to demonstrate that its ongoing actions are non-jeopardizing. *See Southwest Ctr.*, 307 F.3d at 973. Plaintiffs do not bear the affirmative burden to demonstrate that each of the 54 ongoing agency actions, as presently defined, will jeopardize threatened and endangered salmonids or result in irreparable harm. *See Southwest Ctr.*, 307 F.3d at 972; *Thomas*, 753 F.2d at 765.

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[1] The Court ordered EPA "to initiate and complete section 7(a)(2) consultation with NMFS regarding the effects of pesticide-registrations on threatened and endangered salmonids" per a schedule proposed by EPA and endorsed by plaintiffs.

[2] Plaintiffs need not pursue administrative remedies pursuant to FIFRA. *See, e.g., Defenders of Wildlife v. Adm'r, Envtl. Protection Agency*, 882 F.2d 1294, 1298-1300 (8th Cir. 1989).

Neither EPA nor CropLife has identified the proper legal burden, instead relying on unrelated, inapplicable case law.[3] Likewise, as a matter of fact, neither EPA nor CropLife has demonstrated that the 54 ongoing agency actions, as presently defined, are non-jeopardizing to threatened and endangered salmonids.[4] *Compare id.* (acting agency voluntarily imposed mitigation measures, presented evidence of habitat improvement, and consultation process near completion).[5] In contrast, plaintiffs have demonstrated that the relevant agency actions, as presently defined, present a significant, potential harm to threatened and endangered salmonids. *See Greenpeace v. Nat'l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066, 1076-80 (W.D. Wash. 2000). Therefore, plaintiffs are entitled to interim injunctive relief to avoid jeopardy to threatened and endangered salmonids. Further, plaintiffs have demonstrated, with reasonable scientific certainty, that the requested buffer zones - 20 yards for ground applications, 100 yards for aerial

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[3] For example, neither *Nat'l Wildlife Fed. v. Burlington N. R.R. Inc.*, 23 F.3d 1508 (9th Cir. 1994) nor *Water Keeper Alliance v. United States Dept. of Defense*, 271 F.3d 21 (9th Cir. 2001) were cases in which the district court had found a substantial procedural violation under section 7(a)(2).

[4] This *does not* include any ESUs of threatened and endangered salmonids for which EPA has made a corresponding "no-effect" determination with respect to one of the 54 pesticide active ingredients, such as alachlor (all 26 ESUs) or propargite (7 ESUs). Plaintiffs seek no injunctive relief vis-a-vis these specific ESUs and these specific pesticide active ingredients, which are outlined in the declarations of Arthur Jean B. Williams.

[5] EPA makes no discernible effort to demonstrate no-jeopardy. Although CropLife does attempt to carry this burden, its arguments and selective citations simply do not comport with the evidence submitted and the institutionalized caution mandate of the ESA. *See, e.g., Atrazine Reregistration Eligibility Decision*, April 2002 (discussing potential significant adverse effects of atrazine on homing and reproduction in endangered salmon).

applications - will, unlike the status quo, substantially contribute to the prevention of jeopardy. The evidence submitted - including the declarations of *all* parties' experts, reregistration eligibility decisions, EPA risk assessments, prior EPA consultations with the Fish and Wildlife Service, EPA's reliance on California's county bulletin buffer zones, and an EPA expert's current section 7(a)(2) recommendations - demonstrate that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids.

At oral argument, the Court will not entertain a full-blown evidentiary hearing. As stated above, plaintiffs are entitled to injunctive relief, EPA and CropLife have failed to demonstrate no-jeopardy, and buffer zones are an appropriate means to avoid jeopardy pending complete section 7(a)(2) consultation.[6] Moreover, it is the responsibility of EPA and NMFS, not this Court or plaintiffs, to complete the section 7(a)(2) consultation process and determine, via fact-intensive inquiry, the precise effects of pesticide active ingredients on threatened and endangered salmonids. *See Thomas*, 753 F.2d at 765; *see also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831-33 (9th Cir. 2002). It is this consultation process that will determine the long-term measures necessary to prevent jeopardy to threatened and endangered salmonids from EPA's pesticide registrations. However, because EPA failed to propose any interim mitigation measures itself or to make counter-recommendations with respect to plaintiffs' requested buffer zones, the Court will entertain limited argument regarding those buffer zones. That is, EPA and CropLife may present arguments with respect to *the specific size* of the ground

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[6] The Court will not entertain further argument with respect to these issues. EPA made no timely request to bifurcate the threshold legal arguments upon which it principally relies from factual arguments regarding appropriate interim injunctive relief.

and aerial buffer zones requested by plaintiffs. These arguments shall be specific to particular pesticide active ingredients and particular ESUs of threatened and endangered salmonids.[7] In addition, the Court will entertain arguments regarding the additional urban-use restrictions requested for 13 pesticide active ingredients.[8]

Finally, at oral argument the Court would welcome any voluntary input or recommendations regarding the requested buffer zones and urban-use restrictions from NMFS, the agency ultimately responsible for the protection of salmonids. *See generally* 50 C.F.R. §§ 402.13(b), .14(g)-(h) (2002). However, the Court shall not reopen discovery in connection with any participation from NMFS. Rather, NMFS's participation is contingent on its cooperation with all parties. That is, NMFS shall not participate as a witness for any particular party, but may act akin to an informal Court-appointed expert. Even following oral argument and the imposition of interim injunctive relief, the Court shall consider any jeopardy-prevention recommendations from NMFS that may warrant the modification of such relief prior to an EPA "no-effect" determination, NMFS written concurrence, or biological opinion.

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[7] Absent an EPA "no-effect" determination or stipulation from plaintiffs, the Court shall not entertain arguments that no buffer zones are appropriate. EPA and CropLife have had a full and fair opportunity to present such arguments and have failed to carry their burden.

[8] At oral argument, plaintiffs should provide the Court clear and concise definitions and maps of all urban watersheds within the geographic scope of this litigation.

SO ORDERED this 16th day of July, 2003.

/s/ John C. Coughenour

CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C01-0132C

WASHINGTON TOXICS COALITION, et al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY, and CHRISTINE TODD WHITMAN, ADMINISTRATOR,

Defendants,

v.

AMERICAN CROP PROTECTION ASSOCIATION, et al.,

Intervenor-Defendants.

July 2, 2002

ORDER

This matter comes before the Court on plaintiffs' motion for summary judgment (Dkt. No. 14 and defendants' motion to dismiss or for summary judgment (Dkt. No. 58). The Court has considered the papers submitted by all parties and determined that oral argument is not necessary. For the following reasons, plaintiffs' motion for summary judgment is hereby GRANTED in part and DENIED in part, and defendants' motion to dismiss or for summary judgment in hereby GRANTED in part and DENIED in part.

I. BACKGROUND AND LEGAL FRAMEWORK

When Congress enacted the Endangered Species Act ("ESA"), 16 U.S. C. §§ 1531-1544 (2002), it sought to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened." 16 U.S.C. § 1531(b). Congress declared that such species, including species of fish, are of "esthetic, ecological, educational, historical, recreational, and scientific value" to this nation. 16 U.S.C. § 1531(a)(3).

To promote the recovery of species threatened with and in danger of extinction, Congress mandated: "Federal agencies shall, in consultation with and with the assistance of the Secretary,[1] utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1) ("section 7(a)(1)"). Congress also instructed that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . . In fulfilling the requirements of this paragraph each

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[1] Here, "Secretary" means the Secretary of Commerce because the Department of Commerce, through the National Marine Fisheries Service ("NMFS"), is responsible for protecting threatened and endangered anadromous fish, including salmon and steelhead. *See* 16 U.S.C. § 1532(15).

> agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2) ("section 7(a)(2)"). Federal regulations and case law further elucidate these consultation requirements. *See* 50 C.F.R. §§ 402.02 .12 – .14 (2002); *Pac. Rivers Council v. Thomas*, 30 F. 3d 1050, 1054 n.8 (9th Cir. 1994).

The ESA citizen-suit provision allows individuals to protect their and the nation's interests in threatened and endangered species. It provides, "[A]ny person may commence a civil suit on his own behalf – (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of an provision of this chapter or regulation issued under authority thereof . . . ." 16 U.S.C. § 1540(g)(1). Here, plaintiffs assert an interest in threatened and endangered salmon and steelhead (collectively, "salmonids"). These salmonids are native to the Pacific Northwest, including California, Idaho, Oregon, and Washington. The National Marine Fisheries Service ("NMFS") first protected a salmonid under the ESA in 1989.[2] Since then NMFS has listed pursuant to the ESA approximately twenty-five additional salmonids as threatened or endangered throughout the Pacific Northwest.[3]

Plaintiffs [sic] claims stem from the administration of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 –136y (2002), by defendants Environmental Protection Agency and its Administrator, Christine Todd Whitman (collectively, "EPA"). FIFRA comprehensively

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[2] The U.S. Fish and Wildlife Service ("FWS") and NMFS share responsibility for administering the ESA. 50 C.F.R. § 402.01(b) (2002).

[3] NMFS identifies threatened and endangered salmonids by evolutionary significant units ("ESUs"). The concept of ESUs is not relevant to the issues presently before the Court.

governs pesticide[4] registration[5] and use in the United States. No person in any state may distribute or sell any pesticide not registered[6] or exempted pursuant to FIFRA. 7 U.S.C. § 136a(a). Likewise, it is unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). EPA classifies pesticides as general or restricted use, depending on risks to human health and the environment. 7 U.S.C. § 136a(d)(1)(C)(2). EPA must classify a pesticide as restricted use when necessary to prevent unreasonable adverse effects to the environment. 7 U.S.C. § 136a(d)(1)(C)(ii). EPA retains significant discretionary authority over registered pesticides. *See, e.g.*, 7 U.S.C. § 136d.

Plaintiffs assert two types of claims in this action. First, plaintiffs allege that EPA has failed to consult with NMFS regarding the effects of EPA's pesticide-registrations on threatened and endangered salmonids and their habitat, in violation of 16 U.S.C. § 1536(a)(2). Second, plaintiffs allege that EPA has failed to use its authority and programs, in consultation with NMFS, to promote the conservation of threatened and endangered salmonids, in violation of 16 U.S.C.

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[4] Pesticides include "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest . . . [or] for use as a plant regulator, defoliant, or desiccant . . . [or] any nitrogen stabilizer." 7 U.S.C. § 136(u).

[5] EPA shall register a pesticide if, when considered with appropriate restrictions, "(A) its composition is such as to warrant the proposed claims for it; (B) its labeling and other material required to be submitted comply with the requirements of this subchapter; (C) it will perform its intended function without unreasonable adverse effects on the environment; and (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5).

[6] A registered pesticide contains one or more active ingredients. *See* 7 U.S.C. § 136(a) (defining active ingredient); 7 U.S. C. §§ 136a(c)(1)(F)(i), 136a-1(g)(2)(A).

§ 1536(a)(1). Plaintiffs move for summary judgment on all claims. EPA moves to dismiss or for summary judgment on all claims.

II. PLAINTIFFS' CLAIMS UNDER 16 U.S.C. § 1536(a)(2)

Both plaintiffs and EPA move for summary judgment with respect to plaintiffs' section 7(a)(2) claims. Summary judgment is appropriate if the pleadings, affidavits, depositions, and admission on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (2002). If a defendant who moves to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleadings, the Court shall treat the motion as one for summary judgment. Fed. R. Civ. P. 12(b) (2002). In determining whether a genuine issue of material fact exists, the court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986).

A. *The Nature and Justiciability of Plaintiffs' Section 7(a)(2) Claims*

1. *Plaintiffs' Claim Arise Under the ESA Citizen-Suit Provision*

As a preliminary matter, EPA and intervenor-defendants ("CropLife") contend that plaintiffs' claims do not arise under the ESA's citizen-suit provision. The statute provides, "[A]ny person may commence a civil suit on his own behalf – (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof . . . . " 16 U.S.C. § 1540(g)(1)(A). Instead, they argue that the Administrative Procedures Act ("APA") or FIFRA governs plaintiffs' claims.

The APA provides judicial review only with respect to "final agency action[s] for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 161-62 (1997).[7] Thus, the APA only governs a plaintiff's claims when the underlying substantive statute does not independently authorize a private right-of-action. *Defenders of Wildlife v. Adm'r. Envtl. Prot. Agency*, 882 F.2d 1294, 1301-02 (8th Cir. 1989). Here, plaintiffs employ the ESA citizen-suit provision to assert section 7(a)(1) and 7(a)(2) claims. Therefore, the APA, including its peculiar doctrines, does not govern plaintiffs' claims.[8]

Next, CropLife contends that plaintiffs claims constitute an impermissible challenge to valid FIFRA-governed pesticide registrations. However, plaintiffs do not challenge any pesticide registrations. Rather, plaintiffs challenge EPA's alleged failure to consult with NMFS regarding the effects of such registrations on threatened and endangered salmonids. When Congress vests an agency with responsibility for administering a statute, such as EPA's administration of FIFRA, the ESA nevertheless applies to agency actions taken pursuant to that statute. *See, e.g., Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Defenders of Wildlife*, 882 F. 2d 1294. Thus, FIFRA and its procedures do not govern plaintiffs' claims.

CropLife also argues that *Bennett v. Spear*, 520 U.S. 154 (1997), bars plaintiffs' section 7(a)(2) claims. There, the U.S. Bureau of Reclamation commenced formal consultation with respect to an endangered species monitored by the U.S. Fish

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[7] CropLife suggests that the APA trumps the ESA. This proposition merits no response.

[8] For example, in the context of section 7(a)(2) and ongoing agency actions, CropLife's demand for an administrative" agency record" is misplaced.

and Wildlife Service ("FWS"). 520 U.S. at 158-59.[9] The consultation resulted in a biological opinion regulating the Bureau's operation of a large-scale irrigation project. *Id.* Plaintiffs sued FWS, objecting to the resultant reduction in available irrigation water. *Id.* at 160. The Supreme Court held that plaintiffs could not employ the citizen-suit provision to challenge FWS's administration of the ESA. *Id.* at 173-74; *see also Southwest Ctr. For Biological Diversity v. U.S. Bureau of Reclamation*, 143 F. 3d 515, 522 (9th Cir. 1998) (plaintiffs may not use provision to challenge FWS biological opinion, decision to adopt incidental take statement, or reasonable and prudent alternatives; plaintiffs must sue under APA).[10] Here, plaintiffs assert no claims against NMFS, the agency charged with monitoring threatened and endangered salmonids. Accordingly, *Bennett* does not preclude plaintiffs' claims against EPA. *Sierra Club v. Glickman*, 156 F.3d 606, 616-17 (5th Cir. 1998) (*Bennett* does not bar citizen-suit charging Department of Agriculture with section 7 violations). In sum, the ESA citizen-suit provision is the proper avenue for plaintiffs' section 7(a)(1) and 7(a)(2) claims.

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[9] Relevant statutes, regulations, and case law make clear that NMFS and FWS are the sole agencies charged with administering the ESA. EPA, like other federal agencies, must comply with, but not administer, the ESA. In *Bennett*, the Supreme Court explicitly state that private parties may use the citizen-suit provision to ensure that such agencies comply with the ESA. 520 U.S. at 173-74.

[10] As a practical matter, the ESA provides no standard to review the ESA-related administrative decisions of NMFS and FWS. *See Southwest Ctr.*, 143 F.3d at 523 (FWS not required to explain choice or to choose alternative that would most effectively protect species). In contrast, whether an agency has violated mandatory consultation requirements is a straightforward inquiry.

2. *Plaintiffs' Sixty-Day Notice Letter Satisfies All Jurisdictional Prerequisites*

This Court has subject matter jurisdiction only with respect to claims properly identified in plaintiffs' sixty-day notice letter. *See* 16 U.S.C. § 1540(g)(2)(A)(i); *Southwest Ctr.*, 143 F.3d at 520-22 (letter must sufficiently inform defendant of alleged violation so defendant has opportunity to abate). Plaintiffs eight-page July 25, 2000 letter, which appropriately predates their complaint, reads, in part:

> Specifically, EPA has failed on consult with . . . [NMFS] as required [by § 7(a)(1) and (2) of the ESA] . . . to ensure that registered pesticides will not jeopardize the survival and recovery of threatened and endangered salmon and steelhead and to utilize EPA pesticide programs to conserve listed salmonids. . . . Despite the passage of nine years since the first salmonid listing, EPA has not initiated consultation with NMFS under either Section 7(a)(1) or 7(a)(2). . . . EPA has, therefore, violated its ESA obligations. . . . EPA has a duty to consult under Section 7(a)(2) on new registrations, reregistration determinations, and other authorizations or pesticide use, as well as on its existing registrations given that it retains discretion and duties with respect to pesticide registrations. . . . The law requires consultations on all EPA authorizations – existing registrations, reregistrations, new registrations, emergency exemptions, and the like – that may affect listed salmonids and their habitat. Without such consultations, EPA cannot discharge its obligation to ensure that pesticide use in accordance with EPA registrations will not jeopardize salmonid survival or adversely modify critical habitat.

Plaintiffs' letter unequivocally asserts that plaintiffs believe EPA is in violation of sections 7(a)(1) and 7(a)(2) with respect to all ongoing pesticide registrations. Plaintiffs' failure to identify by name specific pesticides, or pesticide active ingredients, does not render the notice insufficient. The instant lawsuit conforms with plaintiffs' notice letter. Thus, this Court has subject matter jurisdiction over plaintiffs' claims.[11]

3. *The Agency Action Requirement*

EPA and CropLife argue that plaintiffs fail to identify specific agency actions subject to section 7(a)(2)'s mandatory consultation requirement. Plaintiffs argue that each pesticide registration constitutes an ongoing agency action requiring consultation. Section 7(a)(2) applies to "any action authorized, funded, or carried out by" EPA. 16 U.S.C. § 1536(a)(2). It applies to all actions in which there remains discretionary federal involvement or control. 50 C.F.R. § 402.03. Further, the term "action" means "all activities or programs of any kind authorized, funded, or carried out, in whole on in part, by Federal agencies," including, but not limited to "the granting of licenses, contracts, leases, easement, rights-of-way, permits, or . . . actions directly or indirectly causing modifications of the land, water, or air." 50 C.F.R. § 402.02.

The Ninth Circuit broadly construes the agency action requirement. *Pac. Rivers Council*, 30 F.3d at 1055. In *Pac. Rivers Council*, the court addressed whether U.S. Forest

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[11] It appears that EPA raised this jurisdictional defense in response to plaintiffs' initial request for formal consultation with respect to particular pesticides. *See* 50 C.F.R. §§ 402.02, .14. Plaintiffs' notice letter made no such request. However, plaintiffs' reply brief makes clear that they do not seek such relief. Whether formal or informal consultation is necessary for particular pesticides is "a side issue that need not be addressed in this case." EPA's arguments regarding the ripeness of a request for formal consultation are also moot.

Service "land resource management plans," adopted prior to the listing of the Snake River chinook, thereafter required section 7(a)(2) consultation. *Id.* at 1051-52. The Forest Service argued that consultation was only necessary when the plans were adopted, revised, or amended. *Id.* at 1053. The court unequivocally rejected this argument[12] and held that the plans, having "ongoing and long-lasting effect[s]," were ongoing agency actions requiring consultation. *Id.* The Ninth Circuit noted that the ESA may require the alteration of ongoing agency activities. *Id.* at 1055 (citing *TVA v. Hill*, 437 U.S. 153, 173 (1978)).

All parties agree that EPA retains significant ongoing discretionary authority with respect to all pesticide registrations.[13] For example, EPA may change the use classification of any pesticide when necessary to prevent unreasonable adverse effects on the environment. 7 U.S.C. § 136a(d)(2). Also, EPA may determine that additional data is required to maintain an existing pesticide registration. 7 U.S.C. § 136a(c)(2)(B)(i).[14] Moreover, FIFRA grants EPA authority to change, cancel, restrict, or immediately suspend registered

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[12] CropLife makes the identical argument here. If proffers no persuasive support for its position that an agency must *actually invoke* its discretionary authority before consultation is required.

[13] In fact, EPA previously invoked this authority to protect a listed species from pesticide use. *See* 60 Fed. Reg. 11,090 (March 1, 1995) (EPA restricts carbofuran use to protect bald eagles.)

[14] FIFRA further mandates that all pesticide registrants submit to EPA any" additional factual information regarding unreasonable adverse effects on the environment. . . ." 7 U.S.C. § 136d(a)(2).

esticides, pesticide labeling, or particular uses. 7 U.S.C. § 136d.[15]

The Court agrees with EPA that EPA's entire universe of pesticide registrations is not a single agency action. Both EPA and plaintiffs suggest that each pesticide registration constitutes a distinct agency action. EPA describes a registration as "a license which establishes the terms and conditions under which the pesticide product may be lawfully sold, distributed, or used." Because EPA retains ongoing discretionary authority to modify the terms and conditions of these "licenses", the Court concludes that each pesticide registration constitutes an ongoing agency action for purposes of section 7(a)(2). *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080-82 (9th Cir. 2001) (agency with discretionary authority to amend or cancel permit subject to ongoing agency action requirements).[16]

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[15] The fact that FIFRA outlines distinct procedures for the cancellation, suspension, or amendment of pesticide registrations is not relevant to whether pesticide registrations constitute ongoing agency actions for purposes of section 7(a)(2). The issues before the Court do not require, as Crop Life suggests, a determination that either FIFRA or the ESA trumps the other. *See Am. Forest & Paper Ass'n v. Envtl. Prot. Agency*, 137 F.3d 291, 298-99 (5th Cir. 1998) (section 7 merely requires EPA to consult with FWS or NMFS before undertaking agency action). In fact, FIFRA explicitly grants EPA authority to consult with other federal agencies regarding the registration of any pesticide. 7 U.S.C. § 136a(f)(3).

[16] There appear to be approximately 953 pesticide active ingredients, contained in approximately 19,000 registered pesticides. The papers submitted by the parties reveal that, for purposes of gauging environmental harm, EPA studies pesticide active ingredients, not simply pesticides. *See* 7 U.S.C. § 136a-1(g)(2)(A) (reregistration eligibility decision premised on analysis of pesticide active ingredients); Decl. Arthur Jean B. Williams. For example, plaintiffs submit EPA's interim reregistration eligibility decision for the pesticide active ingredient bensulide. Decl. Aimee Code, Ex. 8. This decision demonstrates how EPA requires the submission of active-ingredient specific data to support the reregistration of pesticides containing

4. *The Programmatic Challenge Bar Does Not preclude Plaintiffs' Claims*

EPA and CropLife also argue that plaintiffs' section 7(a)(2) claims constitute an impermissible programmatic challenge to EPA's administration of FIFRA in the context of the ESA. The Supreme Court articulated the programmatic challenge bar in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), to preclude plaintiffs from challenging broad agency policies and programs. There, plaintiffs alleged that the Bureau of Land Management ("BLM") violated several federal laws and regulations via the administration of its "land withdrawal review program." *Lujan*, 497 U.S. at 875, 877-79 (Court consumes three pages simply listing laws invoked by plaintiffs).[17] The alleged violations included "failure to revise

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bensulide. Similarly, in proposing its own section 7(a)(2) consultation schedule, EPA contemplates consultation occurring on a per pesticide active ingredient basis, rather than on a per pesticide basis. In fact, EPA reports that is has already made "no-effects" determinations with respect to 292 pesticide active ingredients.

Thus, while the Court identified pesticide registrations as the relevant agency actions, the parties implicitly construe EPA's approval of 953 pesticide active ingredients as ongoing agency actions. The distinction here is inapposite. For purposes of this litigation, the relevant agency actions may be alternatively construed as EPA's registration of all pesticides including particular pesticide active ingredients. As discussed in detail below, plaintiffs have standing to challenge EPA's failure to comply with section 7(a)(2) with respect to all pesticides containing 55 identified pesticide active ingredients.

[17] The Court noted that the term "land withdrawal review program" does not "refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA." *Lujan*, 497 U.S. at 890.

land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, [and] failure to provide adequate environmental impact statements." *Id.* At 891 (citations omitted). In *Lujan*, plaintiffs' claims arose "not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA." *Id.* at 882 (citing 5 U.S.C. § 704). Noting that APA review is available only with respect to final agency actions, the Court held that plaintiffs could not challenge BLM's land withdrawal review program essentially the agency's "day-to-day operations" – because the program was "not an identifiable action or even." *Id.* at 894-99; *see also Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001).[18]

Here, the programmatic challenge bar does not preclude plaintiff's section 7(a)(2) claims. First, as discussed above, plaintiffs' claims arise pursuant to "specific authorization in the substantive statute:" the ESA citizen-suit provision. *Lujan*, 497 U.S. at 882. In contrast, *Lujan* and its progeny are premised on judicial review arising under the APA and its final agency action requirement.[19] Second, plaintiffs' claims bear no

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[18] Sitting *en banc*, the Fifth Circuit further elucidated the programmatic challenge bar in *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000). Pursuant to the APA, plaintiffs had challenged three decades of Forest Service timber-management practices in the State of Texas: particularly clearcutting, seed-tree cutting, and shelterwood cutting. *Id.* at 562-64. The challenge encompassed over a half-dozen statutes and over one dozen regulations. *Id.* at 564-65 n.8. The Fifth Circuit concluded that the APA and *Lujan* barred plaintiffs' claims because plaintiffs had not "actually challenged a specific final agency action." *Id.* at 561, 565-66.

[19] Here, EPA's longstanding failure to commence section 7(a)(2) consultation with respect to threatened and endangered salmonids satisfies any possible finality requirement. *See Sierra Club v. Glickman*, 156 F.3d 606, 618 n.7 (5th Cir. 1998).

similarity to the broad challenges presented in the *Lujan* cases. Plaintiffs concisely allege that EPA is in violation of section 7(a)(2), a singular statutory provision, with respect to the effects of all registered pesticides on threatened and endangered salmonids. In the *Lujan* cases, plaintiffs' complaints were saturated with alleged statutory and regulatory violations. Here, plaintiffs neither challenge broad agency policies, discretionary decisions, EPA's administration of FIFRA, nor the validity of EPA pesticide registrations. EPA and CropLife fail to identify and legitimate EPA "program" challenged by plaintiffs.[20] Although plaintiffs challenge approximately 953 ongoing agency actions, numerosity alone does not constitute a programmatic challenge. The Court's recognition of EPA's programmatic-challenge argument would effectively exempt EPA from section 7(a)(2)'s mandatory consultation requirement where Congress provided no such exemption.

5. *Plaintiffs Have Standing to Challenge EPA's Actions with Respect to 55 Pesticide Active Ingredients*

EPA argues that "plaintiffs have standing only to challenge the [ongoing] registration decisions for the pesticides for which they have provided some evidence of potential harm to the species of their interest, salmon." Plaintiffs assert that the scientific evidence submitted is "illustrative" of the impacts of pesticides on threatened and endangered salmonids. EPA concedes that plaintiffs have standing to assert section 7(a)(2) claims with respect to pesticides, or pesticide active ingredients, for which plaintiffs proffer evidence demonstrating some reasonable connection between pesticide use and salmonid recovery.

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[20] Of course, a "program" of wholesale non-compliance with section 7(a)(2) is patently unlawful. Similarly, the Court would not immunize from challenge an agency "program" entailing the rampant disregard of the ESA's "no-take" provision with respect to numerous endangered species.

Plaintiffs must satisfy both statutory and constitutional standing requirements. It is undisputed that plaintiffs satisfy all statutory standing requirements. The phrase "any person" in the ESA citizen-suit provision reflects everyone's interest in the environment and an expanded notion of standing *Bennett*, 520 U.S. at 164-66 (reasoning that Congress intended "to permit enforcement by everyman"). Here, plaintiffs are interested in the preservation of threatened and endangered salmonids.

Yet, recent Supreme Court precedent dictates a more searching inquiry with respect to constitutional standing. To satisfy constitutional standing requirements, plaintiffs must show: (1) they have suffered some concrete and particularized actual or threatened injury, (2) that injury is fairly traceable to the challenged agency action, and (3) that injury is likely redressable by a favorable decision of the court. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). All parties agree that plaintiffs demonstrate a concrete and particularlized interest in any injury to threatened and endangered salmonids or their habitat caused by EPA-registered pesticides. Moreover, this injury is likely redressable by a favorable decision of this Court. *See Alaska Ctr. For the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994 (defendants' argument with respect to redressability untenable because Congress determined that relief plaintiff seeks is appropriate means to protect plaintiff's interest). However, with respect to approximately 900 pesticide active ingredients, EPA argues that plaintiffs fail to demonstrate that the actual or threatened injury to their interest in salmonids is fairly traceable to, or caused by, EPAs failure to consult with NMFS, pursuant to section 7(a)(2), regarding the effects of pesticide-registrations on threatened and endangered salmonids.

The D.C. Circuit addressed in detail this second constitutional standing requirement in *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996). It held:

> To demonstrate standing . . . a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest. . . . [A plaintiff must establish] that the omission of [a] procedure may cause a government actor to overlook a demonstrably increased risk of injury to a personal and particularlized environmental interest of the plaintiff, and that there is a substantial probability that the government act allegedly implicating the [omitted procedure] will cause that demonstrably increased risk of injury.

94 F.3d at 664-65, 672. Although EPA does not contend that plaintiffs' allegations are based on a "protracted chair of causation" or a "lengthy chain of conjecture", EPA nevertheless argues that plaintiffs do not have standing to assert section 7(a)(2) claims with respect to pesticides for which they submit no evidence of causation. *Id.* at 666, 670.

Plaintiffs argue that their burden with respect to causation is minimal. They contend that the scientific evidence they proffer with respect to particular pesticide active ingredients is illustrative of effects of all pesticides on salmonids and satisfies the "fairly traceable" standing requirement. Plaintiffs rely on *Alaska Ctr. for the Env't*, 20 F.3d 981. There, plaintiffs sued EPA, pursuant to the Clean Water Act, for failing to perform a mandatory "act or duty": to establish "its own list of water quality limited segments and TMDLs within 30 days." 20 F.3d at 983-85 (citing 33 U.S.C. §§ 1313(d)(2), 1365(a)). Defendants argued that plaintiffs only had standing with respect to particular bodies of water in Alaska. *Id.*, at 985. The Ninth Circuit disagreed, reasoning that EPA's statutory duty – to establish TMDLs for the State of Alaska – was a singular

"precise duty" and that all state water bodies were interrelated for standing purposes. *Id.* at 985-86.

Plaintiffs' reliance on *Alaska Ctr.* is misplaced. Here, plaintiffs claims arise under section 7(a)(2), which includes an agency action requirement. The Court has defined the relevant agency actions as EPA's pesticide registrations or, in the alternative, its approval of 953 pesticide active ingredients. Thus, the actions that plaintiffs challenge are not singular, as in *Alaska Ctr.*, but myriad. Although the duty to consult is identical with respect to all registered pesticides, it is distinct with respect to each pesticide. Accordingly, plaintiffs must demonstrate standing separately for each section 7(a)(2) claim. *See Friends of the Earth*, 528 U.S. at 185. The "interrelated" and "precise duty" concepts embraced in *Alaska Ctr.* simply do not comport to the facts and law relevant to the instant lawsuit.[21]

The Court identifies 55 pesticide active ingredients for which plaintiffs submit scientific or competent declaratory evidence demonstrating a causal link between EPA's ongoing registration actions and direct or indirect adverse effects on salmonid populations.[22] However, with respect to the 898 other

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[21] Plaintiffs also rely on *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). There, the court commented, "A plaintiff's burden in establishing a procedural violation [under the ESA] is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed. . . .It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effects of a proposed action on an endangered species when proper procedures have not been followed." 753 F.2d at 765. EPA correctly notes that *Thomas* is not a standing case. *Thomas* also predates the Supreme Court's recent focus on constitutional standing requirements.

[22] The 55 identified pesticide active ingredients are:

- Alachlor, bensulide, bentazon, bromoxynil, captan, chlorothalonil, dichlobenil, 1,3-dichloropropene, fenbutatin-oxide, iprodione,

pesticide active ingredients, plaintiffs submit absolutely no evidence in any form showing that EPA's respective actions are fairly traceable to an actual or threatened injury to threatened and endangered salmonids. In fact, plaintiffs fail to even provide the Court with the names of these pesticide active ingredients. Thus, plaintiffs give the Court no basis to conclude that 898 unidentified pesticides have any adverse effect on salmonids.[23] Supreme Court precedent demands more. Although the Court agrees that plaintiffs' burden is relatively minimal, plaintiffs' evidentiary burden exists with respect to each agency action challenged. Accordingly, the Court GRANTS in part EPA's motion to dismiss or for summary judgment and DISMISSES without prejudice plaintiffs' section 7(a)(2) claims with respect to the 898 pesticide active ingredients for which plaintiffs fail to submit any evidence of causation. Plaintiffs have standing with respect to the 55 pesticide active ingredients identified above.

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methomyl, metolachlor, norflurazon, oryzalin, paraquat dichloride, pebulate, pendimenthalin, prometryn, tebuthiuron, terbacil, thiobencarb, thiodicarb, triclopyr, acephate, dimethoate, disulfoton, ethoprop, fenamiphos, metamidophos, methidathion, methyl parathion, naled, phorate, phosmet, propargite. Decl. Aimee Code.

- Azinphos-methyl, carbaryl, carbofuran, chlorpyrifos, diazinon, malathion, trifluralin, atrazinc, simazine, "2, 4-D", diuron, dicamba, metribuzin, lindane (gamma-BHC & HCH). Decl. Richard D. Ewing, PhD.
- Lindane, oxyfluorfen, molinate, diflubenzuron, coumaphos, linuron. Second Decl. Aimee Code.

[23] As EPA notes, each pesticide is unique in chemical composition, hazardousness, and application. Some scientific or competent declaratory evidence addressing these properties, such as pertinent similarities between pesticides, is necessary to satisfy constitutional standing requirements.

B. *The Merits of Plaintiffs' Section 7(a)(2) Claims*

1. *The EPA Is in Violation of ESA Section 7(a)(2)*

Plaintiffs request a Court declaration that EPA has violated section 7(a)(2). That section mandates:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2). A federal regulation interpreting this provision dictates, "Each agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Neither EPA nor CropLife asserts that EPA has complied with section 7(a)(2) with respect to its pesticide-registrations and determined the effects of those ongoing agency actions on threatened and endangered salmonids.[24]

NMFS listed the Sacramento winter run Chinook in 1989. During the 1990s, NMFS listed as threatened or endangered approximately 25 additional salmonids. Despite competent scientific evidence[25] addressing the effects of pesticides on

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[24] It does appear that EPA has made "no-effects" determinations for approximately 292 pesticide active ingredients.

[25] EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat

salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations. Specifically, EPA proffers no evidence that it has consulted, either formally or informally, with NMFS regarding the 55 pesticide active ingredients for which plaintiffs have standing. Such consultation is mandatory and not subject to unbridled agency discretion. The Court declares, as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of 55 pesticide active ingredients and registration of pesticides containing those active ingredients.

2. *Plaintiffs' Section 7(a)(2) Claims Are Not Moot*

EPA argues that, even if it has violated section 7(a)(2) with respect to its pesticide registrations, plaintiffs' claims are now moot because it has proposed a reasonable schedule for the completion of effects-determinations and consultation. EPA asserts that it is "already in the process of undertaking the procedural relief that the plaintiffs seek" and that "there is a reasonable expectation" that EPA will meet its schedule. With respect to its proposed schedule, EPA must satisfy a "formidable" burden to demonstrate mootness. *Friends of the Earth*, 528 U.S. at 190. EPA must make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189-90.

Plaintiffs and EPA dispute which body of case law is relevant to EPA's mootness argument. Plaintiffs cite several cases where plaintiffs' asserted, as here, section 7 claims pursuant to the ESA. In contrast, EPA suggests that the applicable mootness doctrine is governed by a six-factor test adopted by the Ninth Circuit in *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997). However, that case addressed whether relief was appropriate pursuant to the APA for agency action withheld or unreasonably delayed. 105 F.3d at 507 (citing 5 U.S.C. § 706(1); *Telecommunications Research*

& Action v. F.C.C., 750 F.2d 70, 79-80 (D.C. Cir. 1984)). As discussed above, this lawsuit does not arise under the APA; EPA cites no case in which a court applied this six-factor test to section 7 claims. Thus, this body of case law is neither binding nor persuasive.

Mootness turns on whether circumstances have changed since the outset of the litigation so as to preclude any occasion for meaningful relief. *Am. Rivers v. NMFS*, 126 F.3d 1118, 1123 (9th Cir. 1997) (citations omitted); S. *Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (quotations and citations omitted). In *S. Utah Wilderness Alliance*, plaintiffs' section 7(a)(2) claim became moot because the defendant agency completed informal consultation and received concurrence from the agency monitoring the endangered species at issue. 110 F.3d at 728. That is, the defendant fully satisfied section 7(a)(2). The Ninth Circuit employed the same reasoning in *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1993). There, addressing the BLM's failure to conduct section 7(a)(2) consultations, the court held that injunctive relief is appropriate and warranted until "consultation is satisfactorily completed." *Id.* at 293.

Here, it is undisputed that EPA has not initiated, let alone completed, consultation with respect to the relevant 55 pesticide active ingredients. Yet, EPA suggests that its mere pledge to comply with its proposed schedule moots plaintiffs' section 7(a)(2) claims with respect to these pesticides. Section 7(a)(2)'s consultation procedures are mandatory; the Court has already concluded that EPA has violated this provision. Relevant case law dictates that this Court remains capable of granting meaningful relief; plaintiffs' section 7(a)(2) claims are not moot until EPA satisfactorily completes consultation. EPA's pledge to complete consultation per a reasonable

schedule does not moot plaintiffs' claims.[26] Therefore, the Court GRANTS plaintiffs' motion for summary judgment with respect to plaintiffs' section 7(a)(2) claims and DENIES EPA's motion to dismiss or for summary judgment on these claims.

C. *Appropriate Relief*

EPA proposes a schedule for consultation with respect to 48 pesticide active ingredients initially identified by plaintiffs. Plaintiffs endorse the proposed schedule. Accordingly, the Court ORDERS EPA to initiate and complete section 7(a)(2) consultation with NMFS regarding the effects of pesticide-registrations on threatened and endangered salmonids as follows:[27]

- EPA shall make effects determinations and consult, as appropriate, for 3 pesticides by July 15, 2002.
- EPA shall make effects determinations and consult, as

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[26] Throughout its briefing EPA repeatedly asserts its discretion with respect to section 7(a)(2) consultation. It asks the Court not to substitute its judgment for that of EPA. EPA asks the wrong question. The question is whether EPA may substitute its judgment for that of Congress. The ESA answers that question. Although the Court appreciates the finite resources EPA possesses to fulfill its legal obligations, it cannot disregard Congressional mandates. EPA also suggests that by granting relief this Court is "dictating that EPA adjust its schedule to favor salmonids." The ESA makes the preservation of *all* threatened and endangered species the highest priority. EPA further opines, "Should the Court elect to act in this matter, it could, therefore, be reordering EPA's priorities and schedule for a species that may not in the future even warrant the protections of the ESA [because the species was delisted]." The Court neither comprehends the relevance of unrelated legal or agency proceedings nor is aware of any authority suspending the ESA's unequivocal mandates for such speculative contingencies.

[27] The Court has modified the proposed schedule to include all 55 pesticide active ingredients for which plaintiffs' satisfy constitutional standing requirements.

appropriate, for 3 additional pesticides by August 1, 2002.

- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by December 1, 2002.
- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by April 1, 2003.
- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by August 1, 2003.
- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by December 1, 2003.
- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by April 1, 2004.
- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by August 1, 2004.
- EPA shall make effects determinations and consult, as appropriate, for 7 additional pesticides by December 1, 2004.

EPA also represents that it can complete section 7(a)(2) consultation with respect to all pesticide active ingredients by 2007. Although the Court lacks jurisdiction at this time to compel any such schedule, the schedule appears reasonable.

III. PLAINTIFFS' CLAIM UNDER 16 U.S.C. § 1536(a)(1)

Both plaintiffs and EPA move for summary judgment with respect to plaintiffs' section 7(a)(1) claim. Section 7(a)(1) provides: "All other federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and

threatened species. . . ." 16 U.S.C. § 1536(a)(1). Here, the question is whether EPA, in consultation with NMFS, is using its authorities to carry out programs for the conservation of threatened and endangered salmonids. EPA argues that it has developed such conversation programs. Plaintiffs disagree.

The plain language of section 7(a)(1) requires that an agency carry out its conservation programs "in consultation with and with the assistance of" the agency monitoring the relevant species. *See Sierra Club*, 156 F.3d at 618. In dicta, the Ninth Circuit has noted that agencies have "some discretion" in fulfilling their section 7(a)(1) duties. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990) (noting that agency had begun consultation with NMFS and had altered programs to conserve species via agreement with plaintiffs). Similarly, the Fifth Circuit has found that agencies have decision-making discretion in the context of section 7(a)(1). *Sierra Club*, 156 F.3d at 617; *see also* 50 C.F.R. § 402.14(j) (Secretary's conservation recommendations in biological opinion are discretionary; agency not legally bound to follow recommendations). Given this discretion, one court has held it is improper to declare an agency in violation of section 7(a)(1) when the agency has taken some steps to develop conservation programs. *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 135 (D.D.C. 2001) (plaintiffs argued that defendants had wholly failed to comply with section 7(a)(1) mandate).

EPA argues that it has met all legal obligations imposed by section 7(a)(1). Citing a letter from FWS, plaintiffs assert that EPA has simply paid lip-service to those obligations. EPA correctly notes that section 7(a)(1) does not require any particular conservation program with respect to any particular species and does not apply to each specific agency action. It appears EPA has expressed an intent to administer an "endangered species program". Plaintiffs suggest that any such

"program" has remained dormant for over ten years. There also appears to be some interagency dialogue with respect to pesticide labeling and county-based use restrictions. In addition, EPA avers that it is currently using its authority to carry out several salmonid conservation programs. Such programs include working in conjunction with NMFS and the States of California and Washington to review pesticide use, practices, and effects on salmonids; creating a "public outreach and education program" with NMFS;[28] and developing "enhanced interagency coordination under the Clean Water Act and ESA." EPA also cites a February 2001 correspondence with NMFS regarding the development of conservation programs in conjunction with that agency.

In *Defenders of Wildlife*, the court reasoned, "The record does not support a finding that defendants have failed entirely to carry out programs for the conservation of the pronghorn. Plaintiffs clearly dispute that defendants are doing enough, and believe that the additional measures they advocate should be implicated." 130 F. Supp. 2d at 135. The same is true here. Plaintiffs concede that EPA has initiated proactive consultation with NMFS regarding conservation programs and has developed some programs promoting salmonid recovery. Yet, plaintiffs argue that EPA should be using its pesticide-registration and FIFRA-administration programs to conserve threatened and endangered salmonids in particular ways. Although such programs[29] would undoubtedly benefit salmonid recovery, section 7(a)(1)'s mandate is not so stringent.

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[28] This program apparently includes a website identifying the geographic distribution of listed species and corresponding fact sheets.

[29] For example, plaintiffs submit that EPA could require pesticide registrants to submit additional data pursuant to FIFRA regarding pesticide impacts on salmonids. Plaintiffs also submit that EPA could establish aquatic life criteria pursuant to the Clear Water Act to address the impact of pollutants on salmonids and their habitat.

It is not the province of this Court to judge the substance of EPA's conservation programs or to determine the best way for EPA to promote the conservation of threatened and endangered salmonids. Neither the text of section 7(a)(1) nor relevant case law provide any appropriate authority or standard for doing so. The record reflects that EPA has used its authority to develop some conservation programs in conjunction with NMFS. Agency discretion governs the nature of these programs. As a matter of law, EPA has not violated section 7(a)(1) with respect to threatened and endangered salmonids. Therefore, the Court DENIES plaintiffs' motion for summary judgment with respect to plaintiffs' section 7(a)(1) claim and GRANTS EPA's motion to dismiss or for summary judgment on that claim.

IV. CONCLUSION

In sum, the Court GRANTS in part and DENIES in part plaintiffs' motion for summary judgment, and the Court GRANTS in part and DENIES in part defendants' motion to dismiss or for summary judgment. As a matter of law, defendants have not violated section 7(a)(1). As a matter of law, defendants have violated section 7(a)(2) with respect to the 55 pesticide active ingredients identified above. However, the Court dismisses plaintiffs' section 7(a)(2) claims with respect to 898 unidentified pesticide active ingredients for lack of standing. The Court orders defendants to initiate and complete section 7(a)(2) consultation in accordance with the schedule detailed above, which defendants propose as reasonable. Defendants estimate they will complete section 7(a)(2) consultation with respect to all pesticide active ingredients by 2007. Thus, EPA will have had eighteen years since the first salmonid-species listing in 1989 to fulfill the mandates of the ESA.

SO ORDERED this 2nd day of July, 2002.

/s/ John C. Coughenour

CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX F

RELEVANT PORTIONS OF STATUTES AND REGULATIONS INVOLVED

Administrative Procedure Act § 12, 5 U.S.C. § 559

§ 559 Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

Administrative Procedure Act § 10(c), 5 U.S.C. § 704

§ 704 Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by

rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Administrative Procedure Act § 10(e), 5 U.S.C. § 706

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Federal Insecticide, Fungicide, and Rodenticide Act § 2(*l*), 7 U.S.C. § 136(*l*)

§ 136 Definitions

* * *

(*l*) Imminent hazard

The term "imminent hazard" means a situation which exists when the continued use of a pesticide during the time required for cancellation proceeding would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened by the Secretary pursuant to the Endangered Species Act of 1973 [16 U.S.C. 1531 et seq.].

Federal Insecticide, Fungicide, and Rodenticide Act § 3(a), 7 U.S.C. § 136a(a)

§ 136a Registration of pesticides

(a) Requirement of registration

Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

Federal Insecticide, Fungicide, and Rodenticide Act § 3(c)(5), 7 U.S.C. § 136a(c)(5)

§ 136a Registration of pesticides

* * *

(c) Procedure for registration

* * *

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section-

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

Pub. L. 100-478, § 1010(b), 102 Stat. 2313 (1988), 7 U.S.C. § 136a note

SEC. 1010 Education, Study and Report

* * *

(b) STUDY. -The Administrator of the Environmental Protection Agency, jointly with the Secretary of Agriculture and the Secretary of the Interior, shall conduct a study to identify reasonable and prudent means available to the Administrator to implement the endangered species pesticide labeling program which would comply with the Endangered Species Act of 1973, as amended, and which would allow persons to continue production of agricultural food and fiber commodities. Such study shall include investigation by the Administrator of the best available methods to develop maps and the best available alternatives to mapping as means of identifying those circumstances in which use of pesticides may be restricted; identification of alternatives to prohibitions on pesticide use, including, but not limited to, alternative pesticides and application methods and other agricultural practices which can be used in lieu of any pesticides whose use may be restricted by the labeling program; examination of methods to improve coordination among the Environmental Protection Agency, Department of Agriculture, and Department of the Interior in administration of the labeling program; and analysis of the means of implementing the endangered species pesticide labeling program or alternatives to such program, if any, to promote the conservation of endangered or threatened species and to minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators.

Federal Insecticide, Fungicide, and Rodenticide Act § 6(c), 7 U.S.C. § 136d(c)

§ 136d Administrative review; suspension

* * *

(c) Suspension

(1) Order

If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, the Administrator may, by order, suspend the registration of the pesticide immediately. Except as provided in paragraph (3), no order of suspension may be issued under this subsection unless the Administrator has issued, or at the same time issues, a notice of intention to cancel the registration or change the classification of the pesticide under subsection (b) of this section. Except as provided in paragraph (3), the Administrator shall notify the registrant prior to issuing any suspension order. Such notice shall include findings pertaining to the question of "imminent hazard". The registrant shall then have an opportunity, in accordance with the provisions of paragraph (2), for an expedited hearing before the Administrator on the question of whether an imminent hazard exists.

(2) Expedite hearing

If no request for a hearing is submitted to the Administrator within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court. If a

hearing is requested, it shall commence within five days of the receipt of the request for such hearing unless the registrant and the Administrator agree that it shall commence at a later time. The hearing shall be held in accordance with the provisions of subchapter II of chapter 5 of title 5, except that the presiding officer need not be a certified administrative law judge. The presiding officer shall have ten days from the conclusion of the presentation of evidence to submit recommended findings and conclusions to the Administrator, who shall then have seven days to render a final order on the issue of suspension.

(3) Emergency order

Whenever the Administrator determines that an emergency exists that does not permit the Administrator to hold a hearing before suspending, the Administrator may issue a suspension order in advance of notification to the registrant. The Administrator may issue an emergency order under this paragraph before issuing a notice of intention to cancel the registration or change the classification of the pesticide under subsection (b) of this section and the Administrator shall proceed to issue the notice under subsection (b) of this section within 90 days of issuing an emergency order. If the Administrator does not issue a notice under subsection (b) of this section within 90 days of issuing an emergency order, the emergency order shall expire. In the case of an emergency order, paragraph (2) shall apply except that

(A) the order of suspension shall be in effect pending the expeditious completion of the remedies provided by that paragraph and the issuance of a final order on suspension, and

(B) no party other than the registrant and the Administrator shall participate except that any person adversely affected may file briefs within the time allotted by the Agency's rules. Any person so filing briefs shall be considered a party to such proceeding for the purposes of section 136n(b) of this title.

(4) Judicial review

A final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title, notwithstanding the fact that any related cancellation proceedings have not been completed. Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law. The effect of any order of the court will be only to stay the effectiveness of the suspension order, pending the Administrator's final decision with respect to cancellation or change in classification. This action may be maintained simultaneously with any administrative review proceedings under this section. The commencement of proceedings under this paragraph shall not operate as a stay of order, unless ordered by the court.

Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2)

§ 1536 Interagency cooperation

(a) Federal agency actions and consultations

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Endangered Species Act § 11(g)(1), 16 U.S.C. § 1540(g)(1)

§ 1540 Penalties and enforcement

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf-

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the

prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

50 C.F.R. § 402.13

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any

applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

50 C.F.R. § 402.14(a)-(i)

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to

submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding

any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the ServiceÆs opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the

Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which he biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take*. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

Supreme Court, U.S.
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No. 05-395

In The
Supreme Court of the United States

CROPLIFE AMERICA, *ET AL.*,

Petitioners,

v.

WASHINGTON TOXICS COALITION, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an action brought pursuant to the Endangered Species Act's ("ESA's") express authorization of citizen suits to compel compliance with mandatory ESA obligations subject to the Administrative Procedure Act, which provides a cause of action for agency action only where "there is no other adequate remedy at law," 5 U.S.C. § 704?

2(a). Whether the district court properly ordered the Environmental Protection Agency ("EPA") to determine whether certain pesticides "may affect" threatened and endangered salmon and engage in ESA consultations, as appropriate, where EPA had found the pesticides to be harmful to fish but had taken no steps to ensure, as required by § 7(a)(2) of the ESA, that the pesticides would not jeopardize the continued existence of threatened and endangered salmon?

2(b). Whether the courts below abused their discretion by not treating the Federal Insecticide, Fungicide, and Rodenticide Act provision allowing EPA to suspend a pesticide registration to prevent harm to endangered species as a constraint on the court's equitable power to issue an injunction to preserve the status quo while EPA brings its pesticide registrations into compliance with the ESA?

RULE 29.6 STATEMENT

None of the respondents has a parent company, and no publicly held company owns a 10% equity interest or more in any respondent.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Washington Toxics Coalition, *et al.*, file this opposition to the Petition for a Writ of Certiorari of Petitioners CropLife America, *et al.*

STATEMENT OF THE CASE

This case presented a straightforward claim that the Environmental Protection Agency ("EPA") had failed to engage in the required Endangered Species Act ("ESA") consultations for pesticides it had found likely to harm fish and that it nonetheless had authorized to be used in the range of salmon and steelhead listed under the ESA. The claim relied on EPA's findings of harm and clear ESA mandates. The petition seeks to depart from well-established law based on novel theories that have gained no acceptance in this Court or the courts of appeals.

I. THE STATUTES GOVERNING EPA'S REGULATION OF PESTICIDES

A. The Endangered Species Act

Under § 7(a)(2) of the ESA, each federal agency must ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species. 16 U.S.C. § 1536(a)(2). The agencies must discharge this duty in consultation with the appropriate expert fish and wildlife agency, which, for salmon, is the National Marine Fisheries Service ("NMFS"). The "consultation" regulations define "action" broadly and specifically include "the granting of licenses." 50 C.F.R. § 402.02.

Section 7(a)(2) applies not only to new actions but also to ongoing actions over which the agency retains some "discretionary Federal involvement or control" or where such control is authorized by law. 50 C.F.R. §§ 402.03, 402.16. In *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) ("*TVA*"), this Court applied § 7(a)(2) to a dam whose construction was well underway when Congress enacted the ESA because the section's directive "admits of no exception." The parties here agree that pesticide registrations constitute licenses subject to § 7(a)(2) consultations. Moreover, none of the parties appealed the district court holding that:

> Because EPA retains ongoing discretionary authority to modify the terms and conditions of these "licenses," the Court concludes that each pesticide registration constitutes an ongoing agency action for purposes of section 7(a)(2).

App. 134a.

Under the consultation regulations promulgated jointly by NMFS and the U.S. Fish and Wildlife Service, "[e]ach federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If so, the agency must initiate formal consultation unless it has concluded that the action is "not likely to adversely affect" the species and the appropriate Service has concurred in writing with that finding. *Id.* § 402.14(b). In the absence of such a finding and concurrence, the agency must initiate formal consultation. *Id.* § 402.14(c)-(d). Federal actions that may affect a listed species may not proceed until the federal agency ensures, through completion of consultation and implementation of the results, that the action will not cause jeopardy. *See* 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.13-402.14.

B. The Federal Insecticide, Fungicide and Rodenticide Act

Under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), EPA is charged with regulating the nationwide sale and use of pesticides, "poisonous substances" that are "inherently dangerous." *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801-02 (2005). Under FIFRA, a pesticide may generally not be sold or used in the United States unless EPA has issued a registration authorizing that use. 7 U.S.C. § 136a(a). EPA may register a pesticide for a particular use only if it determines that the use will not "cause unreasonable adverse effects on the environment," 7 U.S.C. §§ 136a(c)(5)(D), a phrase that FIFRA defines as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide. . . ." *Id.* § 136(bb).

EPA has the authority to cancel a previously approved pesticide registration whenever it appears that "a pesticide . . . does not comply with the provisions of this subchapter or, . . . generally causes unreasonable adverse effects on the environment," including harm to endangered species. *Id.* § 136d(b). The agency may also immediately suspend a pesticide registration to prevent an imminent hazard, including to endangered or threatened species survival, during the time it takes to effectuate a cancellation. *Id.* § 136d(c); *see id.* § 136(*l*). EPA is in the midst of a lengthy process of reregistering pesticides that have been on the market for years and often decades prior to the 1972 enactment and subsequent strengthening of FIFRA's environmental safeguards. *Id.* § 136a-1 (timetable for reregistration); *see also id.* § 136a(g)(1) (generally requiring reregistrations every 15 years).

II. EPA'S FAILURE TO CONSULT TO ENSURE ITS PESTICIDE REGISTRATIONS WILL NOT JEOPARDIZE THE SURVIVAL OF LISTED SALMON.

Salmon once thrived in the Pacific Northwest, but their populations have declined dramatically to the point that NMFS has since 1989 listed 26 populations of salmon and steelhead under the ESA. NMFS has identified pesticides as a threat to salmon survival, and has noted that EPA registrations were developed in the absence of information about the full impact of the pesticides on salmon. *See* 65 Fed. Reg. 42,422, 42,457, 42,473 (2000) (salmon protection rule).

Despite the passage of more than a dozen years since the first salmon listing, EPA had initiated no consultations with NMFS on any pesticides when this case was filed in 2001. During this period, EPA made findings in the reregistration process that particular pesticide uses posed threats to fish and their habitat. EPA recognized that these findings triggered its responsibility to assess whether to modify the registrations to protect threatened or endangered species. *See* 54 Fed. Reg. 27,984, 27,992, 28,003 (1989) (EPA conducts a risk assessment to arrive at a "may affect" determination). Nonetheless, for two dozen pesticides commonly used in Washington, Oregon, or California, or frequently detected by the U.S. Geological Survey ("USGS") in salmon watersheds in those states, EPA had reregistered pesticide uses without engaging in any consultation under § 7(a)(2) to ensure that those uses would avoid jeopardy to listed salmon. It has reregistered nearly two dozen more during the pendency of this case. Rather than integrate ESA consultations into its ongoing reregistrations, EPA postponed compliance with the ESA until it developed an

endangered species protection program that was initially proposed in 1989, but never finalized.

III. PROCEEDINGS BELOW

Respondents Washington Toxics Coalition *et al.* ("WTC") brought this case to compel EPA to comply with § 7(a)(2) by consulting on its pesticide registrations that impact threatened and endangered salmon and steelhead ("listed salmon"). WTC introduced evidence that 55 specific pesticides are causing or are likely to cause harm to listed salmon in the form of: (1) EPA's reregistration findings that estimated concentrations likely to migrate into surface water under EPA-authorized uses would exceed EPA's "levels of concern," the levels EPA determined will harm fish or their habitat; and (2) USGS detections of the pesticides in Pacific Northwest and California rivers and streams at levels associated with detrimental impacts to salmon and their habitat.

A. The Summary Judgment Ruling

On July 2, 2002, the district court held that "each pesticide registration constitutes an ongoing agency action for purposes of section 7(a)(2)," App. 133a, and "EPA retains significant ongoing discretionary authority with respect to all pesticide registrations" triggering the duty to consult and avoid jeopardy, App. 134a.

Of particular relevance for this petition, the court rejected EPA and CropLife's contention that the case "do[es] not arise under the ESA's citizen-suit provision." App. 128a. The ESA, not the Administrative Procedure Act ("APA"), governed the case because the ESA citizen suit provision specifically authorizes this action, and because the APA provides judicial review only where "there is no

other adequate remedy in a court." App. 129a (quoting 5 U.S.C. § 704). This holding had several consequences. First, although the court found the APA's final agency action requirement inapplicable, it nonetheless concluded that "EPA's longstanding failure to commence section 7(a)(2) consultation with respect to threatened and endangered salmonids satisfies any possible finality requirement." App. 136a n.19. Second, the court held that judicially crafted standards assessing whether an agency has withheld or unreasonably delayed action in violation of the APA have never been applied in the § 7 context and were inapplicable. App. 143a-144a. Third, where claims fall outside the purview of ESA citizen suits, as is the case for NMFS regulatory actions, the ESA provides no standard for review, and hence the APA standard for review applies. In contrast, "whether an agency has violated mandatory consultation requirements is a straightforward inquiry." App. 130a n.10.

Turning to the merits, the court found that "it is undisputed that EPA has not initiated, let alone completed, consultation with respect to the relevant 55 pesticide active ingredients," App. 144a, and that "EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat," App. 142a n.25. According to the court:

> Despite competent scientific evidence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations. . . . Such consultation is mandatory and not subject to unbridled agency discretion. The Court declares, as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to

> its ongoing approval of 55 pesticide active ingredients and registration of pesticides containing those active ingredients.

App. 142a-143a. The court established a schedule, which ran through December 1, 2004, for EPA to make "may affect" determinations for these pesticides and initiate consultations, as appropriate. App. 145a-146a. EPA has made effects determinations for the 55 pesticides pursuant to that schedule, but no consultations have yet been completed.

B. The Injunction

Because initiation of consultation merely began the process to bring the pesticide registrations into compliance with the ESA, WTC sought further injunctive relief to protect salmon during the consultation process. In support of this motion, WTC submitted findings made by EPA, NMFS and the Fish and Wildlife Service, as well as expert declarations attesting to the pesticides' propensity to enter streams through runoff and spray drift, and to the efficacy of no-spray buffer zones to reduce pesticide concentrations in streams.

Through orders issued on July 16, 2003, August 8, 2003, and January 22, 2004, the district court issued interim injunctive relief. Based on the evidence, and particularly on expert opinions expressed by EPA and NMFS, App. 103a-109a, the court found that "significant, potentially harmful activity is presently ongoing in the face of a substantial unremedied procedural violation of the ESA," App. 109a, and "the relevant agency actions . . . present a significant, potential harm to threatened and endangered salmonids," App. 120a. In light of these findings, the court concluded that "interim injunctive

relief is generally necessary to fulfill the institutionalized caution mandate of the ESA." App. 102a.

The court found WTC had shown "with reasonable scientific certainty, that the requested buffer zones ... will, unlike the status quo, substantially contribute to the prevention of jeopardy." App. 120a-121a. More specifically:

> The evidence submitted – including the declarations of *all* parties' experts, reregistration eligibility decisions, EPA risk assessments, prior EPA consultations with the Fish and Wildlife Service, EPA's reliance on California's county bulletin buffer zones, and an EPA expert's current section 7(a)(2) recommendations – demonstrates that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids. Plaintiffs' experts sufficiently articulate the general efficacy of buffer zones in preventing the migration of pesticides, via spray drift, surface runoff, or erosion, into salmon-bearing waters. Neither EPA nor CropLife dispute these basic principles.

App. 110a; *see* App. 111a-112a.

On January 22, 2004, the court issued an injunction imposing buffer zones for use of the pesticides along salmon-supporting waters – 20 yards for ground applications and 100 yards for aerial spraying. App. 24a. The court crafted alternative buffers for 25 specific pesticide uses based either on EPA's expert recommendations or evidence that the uses were unlikely to produce runoff, and it excluded from the buffers: (1) pesticide uses for which EPA has made "no effect" or "not likely to adversely affect" determinations; (2) public health vector control programs administered by public entities; (3) noxious weed programs implementing safeguards routinely required by NMFS; (4) programs authorized by NMFS under the ESA.

App. 24a-31a. Upon finding buffers alone insufficient to minimize runoff in the urban environment, the court required urban point-of-sale warnings to alert consumers that use of seven pesticides found frequently by USGS in urban salmon streams may harm listed salmon. App. 32a-33a. The district court has not yet entered final judgment.

C. The Appeal

EPA appealed the injunction, arguing that the court erred by not abiding by statutory constraints on EPA's ability to suspend pesticides when it crafted injunctive relief.[1] Specifically, EPA asserted that WTC should have been required to petition EPA to cancel or suspend the pesticide registrations, and the court should have waited for and deferred to EPA's resolution of such petitions in crafting injunctive relief.

CropLife and a split-off set of intervenors led by the Washington State Farm Bureau also appealed. CropLife challenged not only the injunction but also the underlying summary judgment ruling, arguing that the district court erred in holding the APA inapplicable and in finding an ESA violation.

A unanimous panel of the Ninth Circuit affirmed. App. 7a. At the outset, the panel noted that none of the parties disputed the district court's finding that scientific and competent evidence demonstrated a causal link between the 54 pesticides and adverse effects on salmon populations. App. 7a.

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[1] EPA also challenged certain aspects of the point-of-sale warning requirements, which are not implicated by CropLife's petition.

On the merits, expressly agreeing with the Eighth Circuit in *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), the court held that "even though EPA registers pesticides under FIFRA, it must also comply with the ESA when threatened or endangered species are affected." App. 12a; *id.* ("compliance with FIFRA requirements does not overcome an agency's obligation to comply with" the ESA.). Because EPA has continuing authority over pesticide registrations and ongoing discretion to alter the registrations to protect listed species, the court held that "EPA's regulatory discretion is not limited by FIFRA in any way that would bar an injunction to enforce the ESA." App. 14a. The appellate court also rejected EPA's exhaustion argument: "Neither FIFRA nor the ESA, however, suggest any legislative intent to require exhaustion of the FIFRA remedy before seeking relief under the ESA." App. 15a; *id.* ("the mere fact that FIFRA recognizes EPA authority to suspend registered pesticides to protect listed species does not mean that FIFRA remedies trump those Congress expressly made available under ESA, or that FIFRA provides an exclusive or primary remedy.").

Next the court found the APA's judicial review provisions inapplicable because they apply only where there is no other adequate remedy in court and "the ESA citizen suit provision creates an express, adequate remedy." App. 16a.

Finally, the court turned back the "scatter[ed]" challenges to the scope of the injunction. App. 16a. Where an agency has violated its statutory ESA consultation duties, the court held an injunction pending ESA compliance is an appropriate remedy. App. 18a; App. 16a-17a ("It is well-settled that a court can enjoin agency action pending completion of section 7(a)(2) requirements."). Because § 7(a)(2) consultation embodies the ESA's "institutionalized caution

mandate[]" to ensure agency actions will not jeopardize an endangered species's survival, and in light of the evidence of the pesticides' harmful effects, the district court "correctly assigned EPA the burden of proving that its actions were non-jeopardizing" before they could go forward. App. 18a (citation omitted). Finally, the district court was not required to balance endangered species protection against the costs of the injunction to private interests because "Congress has decided that, under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species." App. 18a.

REASONS FOR DENYING THE WRIT

The courts below rejected the invitation made by CropLife, and initially by EPA, to dismiss this case because it had to be brought under the APA, heeding the plain language of the ESA and APA, as well as this Court's precedent. Recognizing that this holding is neither novel nor controversial, CropLife now seeks to import wholesale into ESA citizen suits what it calls the APA's "standards and methods," a phrase used throughout the petition but never clearly defined. The Ninth Circuit did not rule on this convoluted end-run around the ESA's authorization of citizen suits to enforce ESA requirements. Accordingly, CropLife can point to no holding for this Court to review.

Moreover, despite CropLife's emphatic assertion, the district court did not conduct *de novo* review. It held no evidentiary hearing. Nor did it make its own determinations as to whether particular pesticides are likely to adversely affect listed salmon. Instead, it ordered EPA to make such determinations, which EPA has now done. Nor did the district court order EPA to initiate ESA formal consultation before it found a pesticide likely to adversely

affect listed salmonids. In any event, this claim is moot because EPA has now made "may affect" determinations, and the injunction applies only to pesticides that EPA has determined are likely to adversely affect listed salmon.

CropLife can point to no precedent in this Court or any court of appeals holding that an agency's statutory authorization to take a particular action operates as a constraint on the court's equitable power to remedy that same agency's violation of other statutory duties. CropLife argues that the district court had to wait for EPA to decide whether to suspend each of the 55 pesticide registrations under FIFRA, and that any injunctive relief had to coincide with the outcome of that time-consuming process. The court of appeals appropriately held that the court's equitable power is not confined in this manner.

I. THE COURT OF APPEALS'S APA HOLDING DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR THE COURTS OF APPEALS.

The first question presented vaguely asserts that the APA's "standards and methods" apply to ESA citizen suits. Petition at i, 2. The phrase "standards and methods" appears nowhere in the ESA or the APA, and it is not a term of art. Although the bulk of the petition focuses on the APA's standard of review, the petition also advocates for importing wholesale other APA limits on judicial review into ESA citizen suits. And although no longer presented as a jurisdictional argument that WTC had to bring this case under the APA, not the ESA, the newly crafted argument would lead to the same result.

A. The Court's Holding That This Case Arises Under the ESA, Not the APA, Is in Accord With the Governing Statutes and This Court's Precedent.

The courts below held that this case arises under the ESA citizen suit provision. That holding flows directly from the plain language in the ESA and APA, as well as this Court's precedent.

The APA provides an avenue for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. By its plain terms, APA review is unavailable if it would duplicate established statutory procedures authorizing judicial review of agency actions. *See Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The ESA is such a statute. It authorizes citizen suits "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or any regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A).

This Court held unanimously in *Bennett v. Spear*, 520 U.S. 154, 173-74 (1997), that the expert wildlife agencies – NMFS and Fish and Wildlife Service – cannot be sued under the ESA for "failure to perform [their] duties as administrator of the ESA." Claims alleging the Services' "maladministration of the ESA" must be brought under the APA. *Id.* at 177-78. In contrast, "§ 1540(g)(1)(A) is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties," including federal action agencies. *Bennett*, 520 U.S. at 173-74. In contrasting APA review with ESA citizen suits, the Court noted that APA review is limited to "final agency action," while the ESA citizen suit provision contains no comparable

limitation. *Id.* at 174 (extending ESA citizen suits to maladministration claims would "effect a wholesale abrogation of the APA's 'final agency action' requirement.").

CropLife misreads *Bennett* in arguing that lawsuits seeking to compel EPA to comply with the ESA must be brought under the APA. Petition at 19. CropLife tries to characterize EPA as an administrator of the ESA, because EPA must initiate § 7(a)(2) consultations. CropLife's argument would convert any federal agency, whether the Federal Highway Administration or Army Corps of Engineers, into an ESA "administrator" outside the reach of ESA citizen suits. *Bennett* supports no such line-drawing among various tasks performed by action agencies, like EPA. Instead, it distinguished the expert fish and wildlife agencies administering the ESA from the agencies pursuing actions that may harm endangered species (called "action agencies"), which are constrained and regulated by the Act. This position is also flatly at odds with the language of the ESA citizen suit provision, which extends to any person's (including action agencies') violations of the ESA, whether procedural or substantive, but not to the regulators' administration of the Act.[2]

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[2] CropLife tries to draw support for its view that EPA co-administers the ESA from the plurality opinion on Article III redressability in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992), without noting that five Justices explicitly refused to join in the cited portion of the opinion. Moreover, even the plurality qualified its statements about the consulting agency's role in initiating consultations by contrasting the positions taken by the government as to the binding nature of the consultation regulations, calling it an open question, and inserting the word "arguably" before the language quoted in CropLife's petition. *Id.* at 568. Nothing in *Lujan* suggests that action agencies have unfettered discretion to avoid consultation under § 7(a)(2) or that their failure to consult is outside the reach of an ESA citizen suit.

The core APA issue decided below is whether this case arose under the ESA citizen suit or the APA. Because the ESA citizen suit "independently authorizes a private right of action" to compel action agencies to comply with the ESA, the court of appeals properly held that this case "arise[s] under the ESA citizen suit provision, and not the APA." App. 16a; *see also* 129a-130a. The lower courts' resolution of that issue constitutes a straightforward reading of the statutes and renders this case unworthy of review.

B. The APA Standard of Review Issue Pressed by CropLife Was Peripheral to the Proceedings Below and Poses No Conflict With This Court's Precedent or Other Circuits' Decisions.

The court below disposed of CropLife's APA argument in one paragraph, holding that an action to compel agency compliance with § 7(a)(2) arises under the ESA citizen suit provision. Recognizing that this holding is of little moment and poses no conflict with other Circuits, CropLife tries to manufacture a split among the Circuits based on a peripheral issue that the courts below never explicitly addressed. CropLife contends that the court of appeals erred by not deciding that the APA standard of review governs ESA citizen suits. The court of appeals never reached this issue. Moreover, applying the APA's standard of review or even other APA "standards and methods" mentioned in CropLife's petition would have led to the same result.

1. The Decision Below Is Consistent With the Only Other Court of Appeals Decision on Point.

CropLife tries to paint a picture of a conflict among the Circuits on the applicability of the APA's standard of review to a case seeking to compel an action agency to comply with the ESA. Yet it never cites the only other court of appeals decision addressing the interrelation between the ESA, FIFRA, and the APA.

In *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), the plaintiffs sued EPA for violating the ESA with respect to a pesticide registration for strychnine. The Eighth Circuit held that the ESA citizen suit provision permits the plaintiffs "to sue the EPA in an effort to enjoin any asserted violations of the ESA." *Id.* at 1300. Although FIFRA provides the exclusive means for EPA to cancel a pesticide registration, the court held that exhaustion of FIFRA remedies was not a prerequisite to bringing a citizen suit under the ESA. *Id.* at 1299-1300. In contrast, the plaintiffs could not challenge EPA's alleged violations of other statutes that lacked a private right of action without exhausting administrative remedies afforded under FIFRA. *Id.* at 1302-03.

The Eighth and Ninth Circuits agree that ESA citizen suits are the mechanism for challenging EPA's failure to comply with the ESA in registering pesticides. No other court of appeals has addressed the issue, let alone reached a conflicting result.

2. No Other Courts of Appeals' Decisions Are on Point.

The petition posits a conflict between the decision below and "uniform decisions" of the courts of appeals.

Petition at 11. None of the cases that petitioners cite holds that claims seeking to compel action agencies to comply with the ESA must be brought under the APA.[3] Recognizing that there is no conflict between the holding below and any of the cited cases, CropLife strings together a series of disparate decisions on a peripheral issue – whether the lower courts should have applied the APA standard of review for challenges to agency actions. These cases, however, present different causes of action and holdings that have little resemblance or relevance to this case.

Some of the cited cases challenged the Services' alleged maladministration rather than the conduct of an action agency. Therefore, under *Bennett*, they were properly brought under the APA. For example, in *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 12-14 (D.C. Cir. 2005), the D.C. Circuit affirmed dismissal of an APA challenge to a Fish and Wildlife Service protocol for detecting an endangered species of butterfly because it did not satisfy the APA's final agency action requirement. Similarly, in *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1357-58 (Fed. Cir. 1998), the Federal Circuit held that the APA governed a challenge to Department of Commerce regulations implementing a law requiring an embargo on shrimp caught using fishing technology that adversely affected sea turtles. Since these cases properly arose under the APA, it is unsurprising that the courts applied the APA standard of review.

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[3] CropLife's citation of § 559 of the APA, 5 U.S.C. § 559, adds nothing to this argument. None of the cases with which the court of appeals's decision is supposed to conflict even cite this provision. Indeed, petitioners can point to no case in which a court has held that an ESA citizen suit must proceed under APA procedures because the ESA does not "expressly supersede" the APA.

Other cases contain only passing references to issues related to CropLife's APA pre-eminence theory. For example, in *Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 31 (1st Cir. 2001), a case involving review of a preliminary injunction, the First Circuit expressly did not resolve the appropriate standard of review in an ESA citizen suit because Water Keeper had shown no probability of success under the most favorable standard. In *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 372, 373-74 (5th Cir. 1976), although the Fifth Circuit made a cryptic reference to principles governing judicial review of agency action, it held that ESA § 7(a)(2) obligates an agency not only to consider project impacts, but also to take all necessary steps to ensure its action will not jeopardize endangered species' continued existence. And in *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003), the Tenth Circuit affirmed dismissal of a challenge to the Fish and Wildlife Service's response to depredations by reintroduced wolves as not ripe because the action was not final and on several other independent grounds without ever addressing what standard of review it would have applied had the case proceeded. *See also Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 765 (8th Cir. 2004) (dismissing ESA claim as moot since violation had been cured).

Most of the cases cited in the petition involved ESA citizen suits challenging agency actions, rather than an agency's failure to take action required by the ESA. In these cases, the courts generally recited accepted administrative review principles, without ruling on any point of controversy or producing any holding that either had a discernible effect on the outcome or that could give rise to a reviewable conflict. *See id.* (affirming dismissal of ESA challenge to a regulation on ground that National Park Service did not rely solely on a draft study as alleged but on numerous studies); *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209,

1216 (11th Cir. 2002) (holding that the Corps complied with ESA obligations in assessing impacts of road and that additional mitigation created no obligation to prepare a new biological assessment); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976) (affirming district court's determination that Corps satisfied its ESA §§ 7 and 9 duties in proceeding with a dam). CropLife cites a footnote in *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1074 n.21 (6th Cir. 1977), which indicates that the court found that TVA's "decision to complete the Tellico Dam at the expense of the snail darter is 'not in accordance with law.'" Without suggesting in any way that the APA should govern judicial review, this Court upheld the Sixth Circuit based on the mandatory, uncompromising mandates embodied in § 7(a)(2). *TVA*, 437 U.S. at 183-86.

In only two of the cited cases did the courts of appeals hold that the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review applied to an ESA challenge, and both cases involved challenges to agency actions, rather than suits to compel agencies to take ESA-mandated actions. In *Sierra Club v. Glickman*, 67 F.3d 90, 93, 95 (5th Cir. 1995), the Fifth Circuit found fault in the district court's *de novo* review (in the form of a four-day trial) of whether the Forest Service's logging guidelines complied with the ESA. In reaching this result, the court emphasized that the APA prescribes a standard for reviewing agency *actions*, quoting 5 U.S.C. § 706(2). 67 F.3d at 96. Similarly, in *Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 684-85 (D.C. Cir. 1982), the D.C. Circuit rejected the contention that the ESA requires *de novo* adjudications in which the district court substitutes its view of the environmental impacts for those of the agency. Because the ESA does not prescribe a standard of review, the court looked to the APA. While the

APA provides for *de novo* review of certain adjudicatory proceedings, its arbitrary, capricious or not in accordance with law standard governs review of agency action. *Id.* at 685-86.

The holdings in these two cases have no bearing on this case for two reasons. First, both sought review of agency action, rather than to compel an agency to discharge its statutory duties. The courts borrowed the APA standard of review for such actions because the ESA citizen suit specified no standard of its own. In contrast to its express standard of review for challenges to agency actions, 5 U.S.C. § 706(2), the APA is no more explicit than the ESA in setting out a standard of review for an agency's failure to act. The APA authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and the ESA authorizes courts to enjoin any agency that is "in violation of any provision" of the ESA or its implementing regulations. 16 U.S.C. § 1540(g)(1)(A). Although courts have developed judge-made standards for determining when an agency has unreasonably delayed agency action, it is the underlying statute that dictates when an agency has unlawfully withheld agency actions. So, too, it is the underlying ESA mandate that creates the duty that gives rise to an ESA citizen suit claim. The courts below appropriately looked to the ESA's mandates to determine whether EPA had breached its duties under § 7(a)(2).

Second, despite CropLife's protestations to the contrary, the district court did not conduct *de novo* review. The district court never held a trial. Nor did it make its own findings regarding whether particular pesticides warranted formal consultation. Rather, it relied on the findings EPA had made during reregistration decisions that particular pesticides are likely to migrate into water at levels that harm fish. For the

55 pesticides in the case, the court found that "EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat." App. 142a n.25. Even then, rather than direct EPA to enter into formal consultations for all 55 pesticides, the court ordered EPA to make "may affect" determinations and consult, as appropriate, on each of the pesticides. App. 145a-146a. Moreover, when CropLife and EPA asked the Court to hold a full-blown evidentiary hearing and make its own findings regarding the harm the pesticides would cause to salmon, the court refused:

> It is the responsibility of neither plaintiffs nor the Court to determine the precise effects of EPA-registered pesticide active ingredients on threatened and endangered salmonids. Rather, EPA and NMFS shall make these determinations via the fact-intensive inquiry of the section 7(a)(2) consultation process. Only this process itself can determine the long-term measures necessary to prevent jeopardy, adverse impacts, or irreparable harm to threatened and endangered salmonids.

App. 113a-114a (citations omitted).

In sum, the holding below does not conflict with the decisions of any other circuit. At most, CropLife has identified *dicta* in two cases that are at odds with rulings it wishes the courts had made, but did not make, in this case. This case therefore does not present a square conflict appropriate for certiorari review. *See Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from denial of certiorari) ("We sit, after all, not to correct errors in dicta. . . .").

C. CropLife Has No Basis for Asserting That the Outcome Would Have Been Different Had the Courts Adhered Strictly to APA Standards.

CropLife boldly asserts that the outcome below would have been different had the courts strictly adhered to APA standards for reviewing agency action. This assertion is not borne out by the record.

First, as discussed above, the district court deferred to EPA both in ruling on the merits and in crafting the injunction. The court predicated its standing and merits rulings on EPA's findings that the 55 pesticides would likely harm fish.[4] Moreover, the court refrained from making its own determinations as to the effects of particular pesticides on listed salmon and instead ordered EPA to make effects determinations for 55 pesticides and to initiate consultations, where appropriate, based on EPA's determinations. In addition, where EPA recommended specific buffers in its effects determinations, the court incorporated those buffers into its injunction.

Second, the ESA makes NMFS and the Fish and Wildlife Service the expert agencies charged with determining through the consultation process whether federal actions will jeopardize endangered species' survival and crafting mitigation strategies to avoid that outcome. 16 U.S.C. § 1536(a)-(b). If deference should be accorded, NMFS, not EPA, would be the recipient of that deference. *See, e.g., Nat'l Wildlife Fed'n*, 529 F.2d at 375 (deferring to Fish and Wildlife Service regarding mitigation needed to avoid jeopardy).

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[4] Contrary to CropLife's suggestion (at 20 n.8), the district court placed the burden on plaintiffs to prove that EPA had violated its § 7(a)(2) obligations. App. 139a-140a, 142a-143a.

Third, CropLife has made no showing that the APA's other "standards and methods" would produce a different result. For example, even if, contrary to *Bennett*, 520 U.S. at 174, the APA's "final agency action" requirement applied to an ESA citizen suit, the district court found that "EPA's long-standing failure to commence section 7(a)(2) consultation with respect to threatened and endangered salmonids satisfies any possible finality requirement." App. 136a n.19; *see Sierra Club v. Glickman*, 156 F.3d 606, 618 n.7 (5th Cir. 1998) ("Clearly the passage of over 25 years without any action whatsoever with respect to any endangered or threatened species qualifies as 'final agency action.'"). Similarly, even if the courts had applied APA unreasonable delay case law, the result would have been the same, given EPA's 12-year delay in initiating any consultations on pesticides that adversely affect salmon, and its subsequent "may affect" determinations made pursuant to the district court's order. *See, e.g., In re Am. Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (six-year delay in responding to petition seeking consultation "is nothing less then egregious" given ESA's species-protection mandates). Likewise, although CropLife insists that review should have been based on an administrative record, even under the APA, unreasonable delay cases often proceed without an administrative record because agencies rarely generate a record when they have been recalcitrant in carrying out their obligations. *See, e.g., Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (In failure to act case, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record."). In any event, the district court had an ample record on which to resolve this case. WTC introduced EPA's own findings that the authorized uses of the pesticides at issue may harm fish, as well as USGS detections of many of the pesticides in

salmon streams, which substantiated the adverse impacts on salmon. CropLife never identified additional agency documents that should have been, but were not, before the district court, despite having nearly a year to do so during the summary judgment proceedings.[5]

Fourth, CropLife's plea for deference is wholly inapplicable to the judicial crafting of a remedy for EPA's violations of the law. Such a plea for deference essentially asks the courts to allow an agency that has violated the law to determine the remedy for its own wrongdoing. It is the province of the courts, not the offending agency, to determine the scope of the remedy. *See, e.g., United States v. Rohm & Haas Co.*, 500 F.2d 167, 175 (5th Cir. 1974) (refusing to defer to EPA in crafting remedy for EPA's legal violations because "[t]he moulding of equitable relief, even in highly technical matters, is the proper concern of the courts."). Moreover, it is well settled that injunctive relief may be based on evidence beyond what was presented to and considered by the agency. *See, e.g., Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1259-61 (10th Cir. 2003) (extra-record evidence allowed at injunctive stage in record review case); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (same).[6]

In any event, the district court did defer to EPA in setting the timetable for correcting its ESA violations by

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[5] The district court found CropLife's arguments that specific pesticide uses would not harm salmonids belied by EPA's risk assessments and by NMFS and the Fish and Wildlife Service's critiques of those risk assessments. App. 105a-109a.

[6] To the extent CropLife claims that injunctive relief should be determined based on an administrative record, the district court properly observed that it is the "consultation process that serves to generate this scientific record" and "the absence of any record is a result of EPA's own failure to initiate timely consultation with NMFS." App. 91a n.4.

adopting, for the most part, the schedule EPA had proposed for making effects determinations and initiating ESA consultations. In addition, in establishing the buffer zones, the court relied on prior NMFS and Fish and Wildlife Service findings that buffers afford effective mitigation, and it selected the smallest buffers routinely embodied in past Fish and Wildlife Service biological opinions to mitigate harm to species other than salmon from pesticides. App. 110a-111a. Even though neither EPA nor NMFS proposed interim protections, despite the court's repeated invitations to do so, App. 114a-115a, 121a-122a, the court adopted any buffer zones recommended by EPA experts in effects determinations, App. 25a-30a, 104a-105a n.20; 114a-115a, and the court deferred to NMFS's authorization of particular pesticide uses under the ESA. App. 30a-31a. Moreover, the injunction leaves the integrity of the FIFRA registration scheme intact since it imposes interim protections only during the time it takes to complete ESA consultations. Once the consultations are completed, EPA can exercise its authority to modify or cancel FIFRA registrations as needed to guard against jeopardy and mitigate harm to salmon.

In sum, the first question presented does not warrant this Court's review. The holding below is fully consistent with the governing statutes, this Court's precedent, and all relevant circuit authority. Moreover, the ruling CropLife seeks would produce no different outcome.

II. THE SECOND QUESTION PRESENTED IS MOOT.

CropLife's question presented 2(a) asks whether the district court erred in holding that EPA violated § 7(a)(2) when the implementing regulations require consultation only for actions that "may affect" listed species. *See* 50 C.F.R.

§ 402.14(a). As this Court explained in *TVA*, 437 U.S. at 183-85, § 7(a)(2) imposes mandatory obligations on federal agencies that they have no discretion to override. And as the district court stated, and even CropLife concedes, EPA's duty to consult on pesticide registrations that "may affect" listed salmon "is mandatory and not subject to unbridled agency discretion." App. 143a.

CropLife seems to contend that EPA had unbridled discretion to decide when, if ever, to make effects determinations for the pesticides, based on a misleading description of a statement on a tangentially related issue in the plurality opinion in *Lujan*, 504 U.S. at 568-69. *See supra* at 14 n.2. Not only is there no legal basis for CropLife's approach, but it would allow agencies to spurn their § 7(a)(2) obligations, leaving endangered species at risk for inordinate periods of time.

In any event, any such claim is now moot. EPA has made "may affect" determinations for all 55 pesticides. It, therefore, has made the determinations that CropLife concedes trigger the duty to consult. Moreover, the district court tailored injunctive relief to coincide with EPA's effects determinations. Accordingly, the injunction applies only to those pesticide uses that EPA has found "may affect" and are "likely to adversely affect" listed salmon. App. 24a-25a, 34a. In light of its mootness, this question is inappropriate for review.

III. THE COURT OF APPEALS PROPERLY HELD THAT A DISTRICT COURT MAY ISSUE AN INJUNCTION TO REMEDY AN ESA VIOLATION REGARDLESS OF STATUTORY CONSTRAINTS ON THE OFFENDING AGENCY'S AUTHORITY TO TAKE OTHER ACTIONS UNDER OTHER STATUTES.

CropLife's question presented 2(b) asserts that the district court had no equitable power to fashion an injunction to protect endangered species while EPA corrects its ESA violations, but instead had to wait for EPA to suspend the pesticide registrations under FIFRA. In other words, CropLife believes the district court could issue an injunction to remedy an ESA violation only if FIFRA standards were independently violated. If accepted, FIFRA standards and processes for suspending pesticide registrations would trump both the ESA and a court's equitable power. This issue does not warrant this Court's review for four reasons.

First, CropLife's position collides with two well-settled propositions: (1) that the courts have broad equitable power to craft injunctions to remedy violations of the law; and (2) that when Congress creates a right of action, courts have available to them "all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992). In *TVA*, 437 U.S. at 194, this Court held that:

> Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

In reaching this conclusion, *TVA* explicitly rejected the notion that Congress made ESA remedies subservient to

the agency's primary authorizing statute. Because the ESA eliminated agency discretion to avoid protecting endangered species by invoking their primary objectives, *TVA* concluded: "The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." 437 U.S. at 185; *see id.* at 175, 181-83 (same).[7]

Second, as with CropLife's first question, the two courts of appeals to reach the issue are in accord in rejecting this plea for exclusive FIFRA remedies for ESA violations. In this case, the Ninth Circuit rejected the contention that "EPA's regulation of a pesticide under FIFRA bars a suit under the ESA asserting that the continued use of the pesticide violates the ESA," App. 11a, and held that "EPA's regulatory discretion is not limited in FIFRA in any way that would bar an injunction to enforce the ESA." App. 14a. Similarly, in *Defenders of Wildlife*, 882 F.2d at 1300, the Eighth Circuit explicitly rejected the contention that the FIFRA scheme made it improper for the district court to enjoin EPA from authorizing certain strychnine uses until it complied with the ESA.

Third, as the district court observed, the parties cited "absolutely no case arising under the ESA in which a court required plaintiffs to initiate a collateral administrative

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[7] To the extent CropLife is asserting that the district court erred by not heeding the balance struck in FIFRA, *TVA*, 437 U.S. at 184, held that ESA strikes the balance in favor of protecting endangered species: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (ESA "foreclosed the exercise of the usual discretion possessed by a court of equity."); *accord Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987) (same).

proceeding to seek injunctive relief after concluding that the agency had substantially abrogated mandatory section 7(a)(2) obligations." App. 92a. The only case cited in the petition for this novel proposition is *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). However, in *Middlesex*, this Court refused to imply a private right of action for damages because the Clean Water Act authorized particular remedies – injunctions and civil penalties – through its citizen suit provision. Here, the ESA specifically authorizes citizen suits to "enjoin any person . . . in violation of" the ESA, "to enforce" the ESA, and to afford "any other relief." 16 U.S.C. § 1540(g)(1), (5). Nothing in *Middlesex* supports CropLife's assertion that FIFRA establishes the exclusive remedy for EPA's violations of the ESA.

Finally, FIFRA's imminent hazard provision, 7 U.S.C. § 136d(c), was never intended to govern relief in ESA cases. Since long before enactment of the ESA, this provision has governed *EPA's* authority to suspend a pesticide registration during a cancellation proceeding. It has never been read to constrain a *court's* equitable power to remedy an ESA violation.[8] Moreover, FIFRA's imminent hazard provision is but one FIFRA mechanism for protecting endangered species from pesticide impacts. In *Defenders of Wildlife*, 882 F.2d at 1299, the Eighth Circuit observed that EPA has authority to conform its FIFRA registrations to meet ESA standards: "a pesticide registration that runs against the clear mandates of the ESA will most likely cause an unreasonable adverse

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[8] FIFRA contained essentially the same imminent hazard authority prior to enactment of the ESA. The ESA "conforming amendments" did no more than substitute references to the ESA for the predecessor law, including FIFRA's description of harm to imperiled species that could warrant suspension of a pesticide registration. Pub. L. No. 93-205, § 13(f), 87 Stat. 903 (1973).

effect on the environment under FIFRA." Based on this authority, the court of appeals properly held that "EPA's regulatory discretion is not limited by FIFRA in any way that would bar an injunction to enforce the ESA." App. 14a.[9]

This holding makes eminent sense and is fully in accord with *TVA* and this Court's precedent preserving the courts' equitable powers unless a statute expressly overrides them. The only two courts of appeals to reach the issue have refused to make compliance with FIFRA administrative remedies a prerequisite to an injunction remedying an ESA violation. This Court should avoid treading into this theoretical thicket when no lower court has adopted the view that FIFRA trumps ESA remedies.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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[9] The time-limited statutory direction for EPA to conduct a study on ESA protections that allow continued agricultural production was satisfied when EPA provided such a report to Congress in 1991 and has no ongoing effect. Pub. L. No. 478, § 1010, 102 Stat. 2313 (1988), 7 U.S.C. § 136a note. That narrow legal requirement in no way modified the mandates of § 7(a)(2).

No. 05-395

In the Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

WASHINGTON TOXICS COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a suit against a federal agency brought under the citizen-suit provision of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1540(g)(1), a court should apply the same principles of administrative-record review and deference to agency judgments that would be applicable in a suit brought under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

2. Whether Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires in all instances that a federal agency must engage in consultation regarding the effect on endangered and threatened species of actions that the agency has determined will have no effect on those species.

3. Whether, in applying Section 7(a)(2) of the ESA to pesticide registrations issued by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, a court should take into account the statutory limitations that FIFRA places on EPA's authority to suspend or modify such registrations.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 413 F.3d 1024. The opinions of the district court (Pet. App. 20a-87a, 88a-117a, 118a-123a, 124a-150a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2005. The petition for a writ of certiorari was filed on September 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, to protect and conserve endangered and threatened species. 16 U.S.C.

1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533. The Secretary of Commerce, who implements the ESA through the National Marine Fisheries Service (NMFS), has responsibility for the listed species at issue in this case. See 50 C.F.R. 222.23(a), 227.4. The Fish and Wildlife Service (FWS) administers the Act with respect to the species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b).

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b)-(c). Under the regulations, the agency proposing the action (commonly known as the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14.

If the action agency determines that a particular action will have no effect on a listed species or critical habitat, the consultation requirements are not triggered. 50 C.F.R. 402.14(a). If the action agency determines that its action "may affect" listed species, it must pursue either informal or formal consultation with NMFS or FWS (commonly known as the resource agency). Informal consultation is an optional process comprised of all discussions and correspondence between the resource

agency and the action agency intended to determine whether formal consultation is necessary. 50 C.F.R. 402.13. If the action agency determines, with the written concurrence of the resource agency, that the action "is not likely to adversely affect" the listed species or critical habitat, the consultation process is terminated, and formal consultation is not necessary. *Ibid.*; 50 C.F.R. 402.14(b)(1).

If either the action agency or the resource agency determines that the proposed action is "likely to adversely affect" listed species or designated critical habitat, the agencies must engage in formal consultation. 50 C.F.R. 402.13(a), 402.14(a)-(b). Following formal consultation, FWS or NMFS issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If FWS or NMFS concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A).

The regulations governing the consultation process define the term "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. 402.02. "Examples include * * * the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." *Ibid.* The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

The ESA contains a citizen-suit provision allowing "any person" to sue to "enjoin any person, including the United States * * * , who is alleged to be in violation of

any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. 1540(g)(1). The district court in such a suit has authority "to enforce any such provision or regulation." *Ibid.*

b. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, establishes a comprehensive regulatory scheme governing the use, sale, and labeling of pesticides. *Bates* v. *Dow Agrosciences LLC.*, 125 S. Ct. 1788, 1794-1795 (2005). The statute requires the Environmental Protection Agency (EPA) to evaluate individual pesticide products intended for distribution or sale in the United States and to register those that meet FIFRA's requirements. In conducting its evaluation, EPA must determine, *inter alia*, whether a pesticide will cause "unreasonable adverse effects on the environment" when used to perform its intended function. 7 U.S.C. 136a; see 7 U.S.C. 136(bb) (defining the term "unreasonable adverse effects on the environment"). FIFRA makes it unlawful for any person to distribute or sell a pesticide that is not registered or to use any registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. 136a(a), 136j(a). Thus, each registration granted by EPA under FIFRA is a license that establishes the terms and conditions under which the pesticide product may be lawfully sold, distributed, and used.

Section 6(b)-(c) of FIFRA provides for the cancellation and suspension of existing pesticide registrations. 7 U.S.C. 136d(b)-(c). If a pesticide does not comply with FIFRA or, when used in accord with widespread practices, "generally causes unreasonable adverse effects on the environment," EPA may issue a notice of its intent to cancel the registration. 7 U.S.C. 136d(b). In addition, EPA may immediately suspend the registration of a pes-

ticide if it presents an "imminent hazard," which "exists when the continued use of a pesticide during the time required for cancellation proceeding[s] would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened" under the ESA. 7 U.S.C. 136(*l*), 136d(c)(1). Final EPA decisions on cancellation and suspension of pesticide registrations, including refusals to cancel or suspend registrations, are subject to judicial review. 7 U.S.C. 136n(a)-(b).

2. FIFRA's pesticide-registration requirements have been in effect since 1947, Pub. L. No. 80-104, § 4, 61 Stat. 167, and have been enforced by EPA since 1970, Reorg. Plan No. 3 of 1970, § 2, 3 C.F.R. 199 (1970 comp.). More than 900 pesticide active ingredients, in various combinations, are currently contained in approximately 19,000 pesticide products that EPA has registered under FIFRA for use throughout the country. CropLife C.A. E.R. 44. As required by FIFRA, EPA uses a rigorous scientific process to determine whether to register pesticide products. *Id.* at 36-40, 112-114.

Beginning in 1989, NMFS listed 26 evolutionarily significant units (ESUs) of Pacific Northwest salmonids (*i.e.*, salmon and steelhead) under the ESA. CropLife C.A. E.R. 68, 323 n.1. The dominant causes for the decline of wild salmonids have been habitat alteration, hydropower and dam operations, competition with hatchery-bred fish, harvest, and cyclical ocean conditions. *Id.* at 130-140; see, *e.g.*, 65 Fed. Reg. 36,082-36,083 (2000); 64 Fed. Reg. 50,396-50,397 (1999); 64 Fed. Reg. 14,310-14,311 (1999). Pesticides have not been identified as one of the dominant causes for the decline. CropLife C.A. E.R. 140-141.

3. In January 2001, respondent Washington Toxics Coalition and other groups (collectively the Coalition) filed a citizen suit against EPA and its Administrator. CropLife C.A. E.R. 1-18. The Coalition alleged that EPA had violated Section 7(a)(2) of the ESA by failing to consult with NMFS regarding the effects of pesticide registrations on 26 ESUs of endangered and threatened Pacific salmonids. *Id.* at 10-12, 15-16. The primary pesticide manufacturers' trade group and numerous grower groups (some of which are petitioners in this Court) intervened as defendants, and both sides moved for summary judgment. Pet. App. 6a-7a.

In July 2002, the district court issued an order granting summary judgment to the Coalition in part and to the defendants in part. Pet. App. 124a-150a. Among its numerous threshold rulings, the court held that the suit was properly brought under the ESA's citizen-suit provision rather than under FIFRA or the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 128a-129a. The district court further held that the Coalition had established standing to sue with respect to 54 pesticide ingredients. See *id.* at 137a-143a.[1]

On the merits, the court held that EPA had "violated Section 7(a)(2) of the ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients." Pet. App. 143a. The court based that conclusion on its finding that, "[d]espite competent scientific evi-

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[1] The district court's July 2002 opinion stated that the Coalition had established standing with respect to "55" pesticide ingredients. See Pet. App. 137a. The court subsequently recognized, however, that it had double-counted one such ingredient. Later opinions of the district court refer to "54" pesticide ingredients as being at issue in this case. See, *e.g. id.* at 21a, 89a, 119a.

dence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations." *Id.* at 142a-143a. The court established a schedule under which EPA would "make effects determinations and consult, as appropriate," with NMFS regarding the effects of those ingredients on threatened and endangered salmonids. *Id.* at 145a-146a.

In July and August 2003, the district court issued orders indicating that it would grant further injunctive relief pending the completion of any required consultation. Pet. App. 88a-123a. The court held that the plaintiffs were not required to exhaust administrative remedies under FIFRA as a prerequisite to relief that would affect existing pesticide registrations. *Id.* at 91a-93a. The court stated that injunctive relief would be appropriate unless EPA's ongoing actions were shown not to jeopardize listed species, *id.* at 94a-101a, and it found that EPA had not made the requisite showing, *id.* at 102a-109a. The court further held that the evidence supported the imposition of buffer zones—*i.e.*, prohibitions on use of the relevant pesticides in defined areas contiguous to salmon-supporting waters. *Id.* at 110a-112a.

In January 2004, the district court issued its order specifying the terms of further injunctive relief. Pet. App. 20a-87a. The order addressed the 54 pesticide active ingredients for which the Coalition had established standing to sue, and it applied to salmon-supporting waters in Washington, Oregon, and California. *Id.* at 21a-24a. The court applied the injunction to ground use of the identified pesticides within 20 yards of identified waters and within 100 yards for purposes of aerial application, with various exceptions. *Id.* at 24a-31a. When EPA makes a determination that a particular pesticide

ingredient will have "no effect" on or is "not likely to adversely affect" a particular ESU, or the agency otherwise completes consultation under Section 7(a)(2), the injunction automatically terminates as to that ingredient and ESU unless NMFS has rejected or affirmatively failed to concur in any EPA "not likely to adversely affect" determination. *Id.* at 33a-34a.[2]

4. The court of appeals affirmed. Pet. App. 1a-19a. The court held that the requirements of Section 7(a)(2) of the ESA apply to the ongoing registration of pesticides under FIFRA. *Id.* at 11a-13a. The court further held that, because EPA retains "discretion to alter the registration of pesticides for reasons that include environmental concerns," the district court possessed authority to award injunctive relief to enforce the ESA. *Id.* at 13a-14a. The court of appeals also held that use of the administrative mechanisms for rescinding pesticide approvals under FIFRA was not a prerequisite to the district court's issuance of an injunction, *id.* at 15a-16a, and that the plaintiffs' suit was properly brought under the ESA citizen-suit provision rather than under the APA, *id.* at 16a. The court additionally concluded that the district court had "correctly assigned EPA the burden of proving that its actions were non-jeopardizing." *Id.* at 18a.

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[2] On August 5, 2004, during the pendency of the appeal in this case, NMFS and FWS promulgated joint counterpart ESA consultation regulations that provide alternative processes that EPA may use to satisfy its obligations under Section 7(a)(2) of the ESA with respect to pesticide-licensing actions taken under FIFRA. 69 Fed. Reg. 47,732. *Inter alia*, these procedures authorize EPA under certain circumstances to complete informal consultation without the need for the written concurrence of the resource agency. *Id.* at 47,761.

ARGUMENT

Although the decision of the court of appeals is legally flawed, that decision does not squarely conflict with any decision of this Court or another court of appeals, and petitioners have not identified a compelling reason for review by this Court in the absence of such a conflict. The petition for a writ of certiorari therefore should be denied.

1. Petitioners contend (Pet. 2, 9-20) that the court of appeals erroneously declined to apply "APA standards"—in particular, the requirements that judicial review be limited to the administrative record and reflect appropriate deference to the agency's expert and technical judgments—in considering the propriety of the district court's injunctive order. Although petitioners are correct that APA standards of review apply in ESA citizen suits brought against federal defendants, nothing in the court of appeals' opinion is inconsistent with that principle.

The court of appeals understood petitioners (though not the government) to be arguing that the Coalition's suit should have been brought under the APA rather than under the ESA citizen-suit provision. In rejecting that contention, the court stated: "Because [the ESA citizen-suit provision] * * * independently authorizes a private right of action, the APA does not govern the plaintiffs' claims. Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA." Pet. App. 16a. The court of appeals did not suggest, however, that review of EPA's conduct would be less deferential or would involve consideration of a different record in an ESA citizen suit than in an APA action.

The court of appeals had no occasion to address those issues because EPA did not contend on appeal that it had made any decision with regard to ESA compliance that deserved deference under the arbitrary-or-capricious standard, and the agency did not present any administrative record to the district court. This case therefore does not provide an appropriate vehicle for the Court's consideration of any issue concerning the application of APA standards to an ESA citizen suit brought against a federal agency.

2. Under the FWS/NMFS regulations that establish a structure for consultation pursuant to Section 7(a)(2) of the ESA, an action agency need not consult with NMFS or FWS if it determines that a particular action will not affect listed species or their habitat. See p. 2, *supra*. Petitioners contend that the court of appeals erroneously treated EPA's duty to consult with NMFS as a "separately enforceable and universal obligation." Pet. 25; see Pet. 22-25. That claim lacks merit.

The courts below did not disapprove the current FWS/NMFS consultation regulations, nor did they require EPA to consult with NMFS regarding existing pesticide approvals that EPA has determined will have no effect on listed species. The district court ordered EPA to "make effects determinations and consult, *as appropriate*," for the pesticide ingredients at issue. Pet. App. 145a-146a (emphasis added). The court's injunction terminates automatically for a particular pesticide and salmon ESU upon, *inter alia*, "[a] finding by EPA made for ESA Section 7 compliance purposes that the Pesticide will have 'no effect' on the particular Salmon ESU." *Id.* at 34a. Consistent with the applicable regulatory scheme, the injunction thus clearly contemplates that, in appropriate circumstances, EPA may satisfy its

obligations under the ESA without engaging in consultation with NMFS. The court of appeals affirmed the district court's orders (*id.* at 19a), and nothing in its opinion suggests that the Ninth Circuit intended to impose a broader duty to consult than is reflected in the district court's injunction.

3. Petitioners contend (Pet. 25-27) that the court of appeals' decision is inconsistent with the balance struck by Congress between protection of listed species and the promotion of food and fiber production. Although the court of appeals' analysis of the interplay between the ESA and FIFRA is flawed, the court's application of the relevant statutory provisions to the particular facts of this case raises no issue of sufficient importance to warrant this Court's review.

Contrary to the court of appeals' understanding (Pet. App. 11a, 13a), the government does not contest the proposition that EPA's approval of pesticide-registration actions under FIFRA may be subject to the ESA as well as to FIFRA. Rather, the government argued in the court of appeals that the provisions of FIFRA are relevant in determining the precise nature of the agency's ESA obligations. Section 7(a)(2) of the ESA does not require the federal government to ensure that the continued existence of a listed species is never placed in jeopardy. Rather, Section 7(a)(2) requires each federal agency to ensure that "any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Thus, the government's duty is simply to ensure that the species is not jeopardized by actions attributable to the government itself.

Section 7(a)(2) of the ESA defines the term "agency action" to include conduct "authorized" by a federal agency. The FWS/NMFS consultation regulations provide that the term "action" includes "the granting of licenses." 50 C.F.R. 402.02. Thus, at the time an agency takes "action" by granting a license, it is obligated to analyze the anticipated future effects of the licensed conduct to ensure that the issuance of the license "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Once the "agency action" has been taken and the license issued, however, there is no continuing obligation to reexamine the issue unless and until the agency takes further "action" by, for example, cancelling, modifying, or reissuing the license. Cf. *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (same rule for National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*).

Even assuming *arguendo* that Section 1536(a)(2) could properly be construed to impose obligations on a licensing agency with respect to previously issued licenses or permits, moreover, the scope of those obligations would necessarily be limited by the scope of the agency's authority, under the provisions of law that govern the relevant licensing program, to rescind or modify the existing license. See *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Thus, for example, if FIFRA absolutely prohibited the EPA from cancelling or modifying existing pesticide registrations, Section 7(a)(2) of the ESA would not override that prohibition. Under that hypothetical statutory scheme, the continuing existence of a pesticide registration could not constitute an "agency action" within the meaning of Section 7(a)(2) because EPA would lack ongoing "discretionary Federal

involvement or control" (50 C.F.R. 402.03) over the registration. In reality, of course, FIFRA does not prohibit the EPA from cancelling or modifying pesticide registrations, but it does significantly limit EPA's discretionary control over existing pesticide registrations by imposing substantive and procedural requirements that EPA must satisfy before taking such steps. 7 U.S.C. 136d(b)-(c).

Because Section 7(a)(2) of the ESA does not apply to agency *inaction* like that at issue here, and does not require agencies to take actions that are not authorized by their organic statutes, the district court should not have ordered injunctive relief affecting pesticide registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration had been met. EPA simply has no "discretionary authority" to cancel or modify pesticide registrations beyond that conferred by—and subject to the limitations of—FIFRA itself. The courts below therefore erred in overlooking those statutory constraints.

Although the court of appeals misapprehended the nature of the relationship between the dictates of FIFRA and the scope of EPA's obligations under the ESA, petitioners do not cite any other court of appeals decision that has addressed the interplay between the two statutes. In the absence of a circuit conflict, the Ninth Circuit's analysis of the relationship between FIFRA and the ESA as applied to this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-395

IN THE
Supreme Court of the United States

CROPLIFE AMERICA, *ET AL.*,

Petitioners,

v.

WASHINGTON TOXICS COALITION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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1. The district court held that the Administrative Procedure Act ("APA"), "including its peculiar doctrines, does not govern plaintiffs' claims." App. 129a. The Ninth Circuit affirmed the district court's orders "in their entirety" (App. 7a) – orders that upset numerous agency decisions, over the course of decades, on the basis of perceived errors in the Endangered Species Act ("ESA") consultative process. The decision reflects a level of judicial interference with ordinary agency processes far beyond anything that the APA would allow. As shown in the Petition (at 11-20), the notion that the APA does not apply to ESA citizen suits against federal agencies conflicts with the uniform holdings and understandings of all courts of appeals that have addressed the issue, with the language of the APA, and with this Court's decisions on the proper scope of judicial review of federal agency conduct.

The foundation for the Ninth Circuit's ruling was its mistaken view that the APA does not apply if the suit is brought under a citizen suit provision, here 16 U.S.C. § 1540(g), rather than *directly* under the APA's judicial review provision, 5 U.S.C. § 704. *See* App. 16a, 128a-129a. As the Petition shows (at 8-9), that reasoning creates the disquieting anomaly, apparent here, that the very same agency action will be reviewed under deferential APA standards by one court and sustained, and later reviewed as a citizen suit in another court and rejected. The ruling's significance – and the significance of the clear conflict in the circuits – is heightened for two reasons: first, the ruling creates inconsistent agency obligations, varying by circuit, and second, the Ninth Circuit, the source of the conflict, is home to large numbers of citizen suits under the ESA and other federal environmental statutes. *See* Pet. at 14 & n.5.

2. Federal Respondents (at 9) agree with Petitioners that "APA standards of review apply in ESA citizen suits brought against federal defendants."[1] They contend,

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[1] The cases collected in the Petition (at 11-13) reflect the consensus of the circuits and support Petitioners' and Federal Respondents' view that APA standards of review do apply. Although Respondents Washington Toxics Coalition, *et al.* ("Coalition"), try to distinguish some of the cases (at 16-21), they are unable to identify any case other than this one in which a court has held that APA principles do not apply in ESA citizen suits against the federal government. Indeed, in ESA cases where the applicability of the APA has been contested, courts have (until now) consistently held that the APA applies. *See, e.g., Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998); *Coalition for Sustainable Resources v. U.S. Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001). Additionally, the D.C. Circuit recently reiterated

(continued....)

however, that "nothing in the court of appeals' opinion is inconsistent with that principle." *Id.* The Government's benign interpretation of the Ninth Circuit's ruling is facially inconsistent with that ruling:

a. Federal Respondents' position rests on the assertion that the Ninth Circuit "understood . . . petitioners to be arguing that the [plaintiffs'] suit should have been brought under the APA rather than under the ESA citizen-suit provision." Fed. Opp. at 9. In fact, that was not Petitioners' argument and that was not the Ninth Circuit's understanding. The Ninth Circuit correctly identified Petitioners' issue as whether "the district court erred by *not applying* the APA and its limited provision for judicial review of final agency action." App. 16a (emphasis added).[2] At issue before the Ninth Circuit, as that court ostensibly recognized, were the substantively important questions of the *applicability* of the APA and "peculiar" APA principles of review, not the question whether this suit *arose under* the APA. *See also* Pet. at 8-9. That the Ninth Circuit proceeded to sidestep the

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(continued) . . .

why APA principles apply in *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005).

[2] *See also* App. 62a ("intervenors contend that the case is governed by the principles of judicial review and injunctive standards" of the APA). The Ninth Circuit's statement of the issue also belies the Coalition's argument (at 12) that the first question presented in the Petition is "newly crafted." The record reflects that the same question figured prominently in Petitioners' district court briefs and was the lead argument in Petitioners' opening brief to the court of appeals. *See* App. 9a (describing intervenors' APA arguments as including the district court's failure to review on an administrative record and its failure to apply a deferential standard of review).

key question – by finding it determinative that the case arose under the ESA – does not change the significance of the ruling.

b. Federal Respondents ascribe to the Ninth Circuit the view that the district court's failure to apply the APA's "peculiar doctrines" made no difference:

> The court of appeals did not suggest . . . that review of EPA's conduct would be less deferential or would involve consideration of a different record in an ESA citizen suit than in an APA action.

Fed. Opp. at 9. But, the *absence* of such a statement simply reflects that the Ninth Circuit curtailed any APA analysis with the conclusion that the suit arose under the ESA.

c. In fact, Federal Respondents' basic objection to the result of the Ninth Circuit's analysis highlights the importance of reviewing the agency action under APA standards, rather than as a *de novo* ESA proceeding. Federal Respondents' fundamental grievance with the decision below is that the lower courts purported to review supposed failures to consult over the course of decades, giving rise to pesticide registrations, as if allowing these registrations to *remain* lawful were some type of current, continuing violation of the ESA – requiring equitable relief. Federal Respondents (at 13) postulate that § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), "does not apply to agency *inaction* like that at issue here."

However, if the Ninth Circuit had begun where it should have begun, *with the APA*, the very first question would have been, "What is the discrete 'agency action' or 'failure to act' being reviewed?" Perhaps that question would have taken the Ninth Circuit back to the various agency decisions on the registrations, or re-registrations, most of them many years

before these 26 varieties of salmon were listed under the ESA, and to the factual records before the agency at those sundry times. Here, judicial review was not conducted on the agency "record," as the APA dictates. 5 U.S.C. § 706. Or perhaps, recognizing that the APA applies, the district court or the Ninth Circuit might have thought to ask plaintiffs if they were complaining about the agency's alleged "failure to act," *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-64 (2004). Moreover, if the objection here was to a continuing *failure* to act, it would be difficult to show a violation of the consultation provision of ESA § 7(a)(2), which is predicated on an agency's taking some "action." 16 U.S.C. § 1536(a)(2). Certainly, the agency's reasonable position that § 7(a)(2) applies only to action, not failures to act, would have been given deference.

In sum, proceeding in a manner consistent with the APA would have given rise to a very different type of district court action and almost certainly would have had a decisive effect on the outcome. The rule that comes out of the decision means that once the Environmental Protection Agency ("EPA") takes action by registering a pesticide, EPA's "ongoing regulatory authority" is sufficient to (a) continuously trigger ESA § 7(a)(2) at whatever time a plaintiff happens to bring suit, and (b) then allow judicial review to proceed, as happened here, with no focus on a particular agency action, no administrative record for that action, no presumption of agency regularity, and no deference to agency expertise. That approach is fundamentally at odds with the APA.

d. Federal Respondents (at 10) say that, because EPA did not specifically argue that it had made any decision "with regard to ESA compliance that deserved deference under the arbitrary-and-capricious standard" and did not

present an administrative record to the district court, this case is not an "appropriate vehicle" for this Court's consideration of the APA's applicability. Federal Respondents' assertion misses the mark because those arguments were, in fact, presented to the courts below: Petitioners presented them to both courts, the district court rejected them, and the Ninth Circuit affirmed the district court's orders "in their entirety." *See* App. 6a, 16a, 129a, 136a-137a. If the courts below had not rejected APA review at the outset, there most certainly would have been an identification of the agency actions (or inactions) under review, presentation of a record, and review under the arbitrary and capricious analysis.

The decision to brush aside the APA led the courts to review allegedly "ongoing" agency conduct on a record compiled for the first time in the reviewing court. *See* App. 14a, 129a, 132a-134a. Such review is antithetical to the APA's well-recognized limitations on judicial review. *See* Pet. at 15 n.6, 20 n.8. Those limitations allow review only of specific agency actions or cognizable failures to act,[3] based

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[3] The Coalition contends (at 20) that suits challenging agency inaction are subject to different standards from suits challenging action. This argument is meritless, as it ignores this Court's recent holding in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 61-63, that the APA's judicial review provisions uniformly govern court review of agency action as well as agency "failure to act." The "ESA does not provide any consequences for failure to act within the prescribed time." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995). In the absence of express provisions in the ESA, the APA standards apply. *See* 5 U.S.C. § 559; Pet. at 15-16. *See also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176-77 (9th Cir. 2002); *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d at 1252 (all

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on the administrative record before the agency at the time of the alleged default, while according the agency a presumption of regularity and respecting the agency's reasonable interpretations of statutes it administers.[4] The lower courts' infidelity to these constraints conflicts with every circuit that has addressed the issue and "so far departs from the accepted and usual course of judicial proceedings" as to "call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a).

3. Federal Respondents agree with Petitioners that the Ninth Circuit's analysis of the interplay between the ESA and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") is "flawed." Fed. Opp. at 11; *see* Pet. at 25-27. Federal Respondents further agree that "the district court should not have ordered injunctive relief affecting pesticide

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applying 5 U.S.C. § 706(1) to suits contesting the unlawful delay of ESA listing and similar actions).

[4] The Coalition's view (at 11, 20) that the district court did not engage in *de novo* review because it did not hold an evidentiary hearing misses the point. Either the court conducted its review on the administrative record comprising the information that was before EPA at the time of each of the 54 pesticide registrations, or it improperly relied on a "new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The latter happened in this case. EPA admittedly filed no administrative records of its pesticide registrations. *See* Fed. Opp. at 10. And, as the Coalition acknowledges, the district court based its ruling on "evidence" submitted by the parties. Coalition Opp. at 7 (citing App. 103a-109a); *see also* App. 6a (district court "allowed all parties, including the intervenors, to introduce evidence on the effects of the use of the challenged pesticides"); *id.* at 8a (summary judgment was based on the parties' "voluminous filings on the effect of various pesticides"); *id.* at 139a (relying on "scientific or competent declaratory evidence" submitted by plaintiffs).

registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration had been met." Fed. Opp. at 13; Pet. at 26.[5] Despite concluding (at 13) that "the Ninth Circuit misapprehended the nature of the relationship between the dictates of FIFRA and the scope of EPA's obligations under the ESA," Federal Respondents suggest that that issue, standing alone, does not warrant certiorari because Petitioners do not identify a circuit conflict on the relationship between FIFRA and the ESA. *See* Fed. Opp. at 13.

To be sure, this decision below may be the first in which a court of appeals has addressed the interplay between FIFRA and the ESA's consultation provisions.[6] But the fact

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[5] *See also* Fed. Opp. at 13 ("Because Section 7(a)(2) of the ESA . . . does not require agencies to take actions that are not authorized by their organic statutes, the district court should not have ordered injunctive relief affecting pesticide registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration has been met."). Thus, the Solicitor General disagrees with the Coalition's analysis (at 27-30) that the remedy is lawful. While that remedy might not directly contravene other appellate precedents on the ESA and FIFRA, the injunction conflicts with this Court's approach that a court cannot grant a remedy that is inconsistent with a comprehensive remedial scheme enacted by Congress. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). Those "conflicts with relevant decisions of this Court" provide a strong basis for entertaining review. S. Ct. Rule 10(c).

[6] *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), cited by the Coalition (at 28), is not germane. It involved substantive allegations that EPA's registration of strychnine constituted a "take" of endangered species in violation of ESA § 9, 16 U.S.C. § 1538, not allegations that EPA had committed procedural violations of the ESA by failing to consult under ESA § 7(a)(2). In

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that this is the first circuit to address such an issue is simply the reflection of the expanded breadth of judicial oversight that follows from the Ninth Circuit's decision to jettison the APA in favor of *de novo* ESA review and perpetual reviewability. The underlying issue concerning the relationship between FIFRA and the ESA is independently important, however – especially so in conjunction with the *de novo*/continuing violation/no APA review issue described above. Its importance arises because the question lies at the intersection of two major federal environmental statutes, because Congress has spoken to the statutory interplay (and the Ninth Circuit's approach conflicts with congressional intent), because the Ninth Circuit will become the forum of choice for litigants seeking injunctions against a wide variety of pesticides, because the type of injunction approved by the Ninth Circuit creates risks to the Nation's food and fiber supplies, and because the Ninth Circuit's ruling imposes a substantial new burden on EPA and, by extension, on pesticide manufacturers and users.

The Ninth Circuit has imposed an apparently continuing duty on EPA to review the pesticides it has approved to

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Defenders, the *registration itself* was found to constitute a substantive violation of the ESA's "take" prohibition. The court held that the ESA's citizen suit provision, by authorizing suit to "enjoin" a "violation" of the ESA, enabled the district court to enjoin the continued registration of strychnine without requiring plaintiffs to follow FIFRA's process for canceling a pesticide registration. *Id.* at 1298-1300. Here, in contrast, the alleged violation was not the registrations *per se*, but the failure to consult. The appropriate remedy for this procedural violation would be simply to enjoin EPA to complete any requisite ESA procedures, not to suspend the registrations without regard to FIFRA's process for doing so.

determine whether there is, at *any* time, information requiring a different effects determination and, if so, to engage in ESA § 7 consultation. *See* Pet. at 20-22.[7] The burden is large and manifestly at odds with the views and longstanding practices of the federal agencies that must administer and adhere to FIFRA and the ESA. *See* Fed. Opp. at 11-13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] Without citing any authority, the Coalition contends (at 25-26) that Petitioners' question concerning the predicate for requiring consultation is moot because EPA has made the threshold "may effect" determinations for the pesticides in question. But, as Federal Respondents' failure to join in this argument suggests, the issue is not moot. Here, the finding of an alleged ESA "violation" has ongoing ramifications because the injunction remains in place, and EPA and the National Marine Fisheries Service must take further steps on each pesticide unless an ESA "no effect" determination is made.